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IN THE

Supreme Court of the United States

October Term, 1996

HUBERT SPECKARD, Superintendent of Groveland Correctional Facility; and DENNIS VACCO, Attorney General of the State of New York,

Petitioners,

against

STEVEN AYALA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the direct constitutional conflict between the United States Court of Appeals for the Second Circuit and the New York Court of Appeals as to the procedure to be utilized in closing a courtroom during the testimony of an undercover narcotics officer justifies the exercise of certiorari jurisdiction.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

POINT

Because the United States Court of Appeals and the New York Court of Appeals are now in conflict regarding the procedure by which a courtroom can be closed, and because this conflict has already disrupted and will wreak havoc with the administration of justice as it pertains to numerous drug cases in New York State, the instant case is of such extraordinary importance that review by this Court is warranted 11

CONCLUSION 20

APPENDIX:

Appendix A: Opinion upon rehearing of the Court of Appeals for the Second Circuit 21

Appendix B: Original Opinion of the Court of Appeals for the Second Circuit 32

Appendix C: Decision and Order of the United States District Court for the Southern District of New York 45

Appendix D: Opinion of the Supreme Court of the State of New York, Appellate Division, First Department 54

Appendix E: Denial of Leave to Appeal by the New York Court of Appeals 56

Appendix F: Transcribed Minutes of Hearing to Close the Courtroom During the Undercover Officer's Testimony .. 57

Appendix G: Opinion of the New York Court of Appeals in People v. Martinez, 82 N.Y.2d 436 (1993) 65

Appendix H: Opinion of the United States Court of Appeals for the Second Circuit in Pearson v. James, ___ F.3d ___, 1997 WL 33521 (2d Cir. January 30, 1997) 74

TABLE OF AUTHORITIES

Page

Cases

Ayala v. Speckard, 89 F.3d 91 (2d Cir.), modified on granting of rehearing, 102 F.3d 649 (2d Cir. 1996) ..... passim

Ayala v. Speckard, 1995 WL 373419 (S.D.N.Y. June 21, 1995) 2

Braxton v. United States, 500 U.S. 344 (1991) 11

Gannett Co. Inc. v. DePasquale, 443 U.S. 368 (1979) 18

Okonkwo v. Lacy, 104 F.3d 21 (2d Cir. 1997) 15

Pearson v. James, ___ F.3d ___, 1997 WL 33521 (2d Cir. January 30, 1997) 14, 18

People v. Ayala, 83 N.Y.2d 908 (1994) 2, 6

People v. Ayala, 202 A.D.2d 262 (1st Dept. 1994) 2, 5, 6

People v. Bowden, ___ A.D.2d ___, 651 N.Y.S.2d 453 (1st Dept. 1996) 16

People v. Brown, ___ A.D.2d ___, 1997 WL 30680 (N.Y.A.D. 1 Dept. January 28, 1997) 16

People v. Ford, ___ A.D.2d ___, 1997 WL 24328 (N.Y.A.D. 1 Dept. January 21, 1997) 16

People v. Joseph, 85 A.D.2d 546 (1st Dept. 1981) 16

People v. Kin Kan, 78 N.Y.2d 54 (1991) 16

People v. Lugo, ___ A.D.2d ___, 650 N.Y.S.2d 102 (1st Dept. 1996) 16

People v. Martinez, 82 N.Y.2d 436 (1993) ..... passim

People v. Nieves, ___ A.D.2d ___, 648 N.Y.S.2d 583 (1st Dept. 1996) 17

People v. Pearson, 82 N.Y.2d 436 (1993) 12

People v. Pepe, ___ A.D.2d ___, 1997 WL 7024 (N.Y.A.D. 1 Dept. January 9, 1997) 16

People v. Richards, ___ A.D.2d ___, 1997 WL 34897 (N.Y.A.D. 2 Dept. January 27, 1997) 17

People v. Rivera, ___ A.D.2d ___, 649 N.Y.S.2d 413 (1st Dept. 1996) 17

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 10, 15, 18

Teague v. Lane, 489 U.S. 288 (1989) 13

United States v Raffoul, 826 F.2d 218 (3d Cir. 1987) 18

Waller v. Georgia, 467 U.S. 39 (1984) ..... passim

Constitutional Provisions

United States Constitution, First Amendment 10, 15, 19

United States Constitution, Sixth Amendment 3, 15, 19

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2241 3

28 U.S.C. § 2254 3

New York Penal Law § 220.06(5) 5

New York Penal Law § 220.16(1) 5

New York Penal Law § 220.39(1) 5

Court Rules

United States Supreme Court Rule 10a 2, 3, 11, 18

United States Supreme Court Rule 10c 3, 19

Other Authorities

Fisher, Steven W. " 'Ayala': Closing the Court in Narcotics Cases," New York Law Journal, January 23, 1997, p. 1, col. 1. 15

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STEVEN AYALA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner (hereinafter "the State") respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-captioned case on December 11, 1996.

Opinions Below

The opinions of the United States Court of Appeals for the Second Circuit appear at 89 F.3d 91 (2d Cir.), modified on granting of rehearing, 102 F.3d 649 (2d Cir. 1996) (Cardamone, Altimari, Parker, JJ.). The latter opinion, dated December 11, 1996, is appended as Appendix A; the original opinion, dated July 15, 1996, is appended as Appendix B. The Court of Appeals reversed the District Court's denial of a petition for a writ of habeas corpus. The United States District Court opinion (Keenan, J.), dated June 21, 1995, denying respondent's petition for a writ of habeas corpus (1995 WL 373419) (S.D.N.Y.), is appended as Appendix C. The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, dated March 10, 1994, People v. Steven Ayala, 202 A.D.2d 262, 608 N.Y.S.2d 642 (1st Dept. 1994), affirming the judgment of conviction, and the order of the New York Court of Appeals denying leave to appeal, dated May 5, 1994, People v. Steven Ayala, 83 N.Y.2d 908, 614 N.Y.S.2d 390, 637 N.E.2d 281 (1994), are appended hereto as Appendices D and E.

Jurisdiction

The date on which the judgment of the Court of Appeals was entered was December 11, 1996. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which states that cases in the courts of appeals may be reviewed by the Supreme Court by a writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. This petition for a writ of certiorari should be granted in this Court's discretion since "a United States court of appeals has . . . decided an important federal question in a way that conflicts with a decision by a state court of last resort. . . ." U.S. Sup. Ct. Rule 10a. This petition should also be granted since the

decision of the United States Court of Appeals for the Second Circuit is "in conflict with the decision of another United States court of appeals on the same important matter" (U.S. Sup. Ct. Rule 10a) and "conflicts with relevant decisions of this Court" (U.S. Sup. Ct. Rule 10c).

Constitutional and Statutory Provisions Involved

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ."

Statement of the Case

Review of a judgment of a United States court of appeals is sought. The basis for federal jurisdiction in the court of first instance is 28 U.S.C. § 2254. The court's power to grant the writ is derived from 28 U.S.C. § 2241.

The State Trial

A. The Application to Close the Courtroom During the Undercover Officer's Testimony

Trial proceedings were in the Supreme Court, Bronx County. Essentially, the respondent was tried for selling drugs to an undercover officer in a "buy-and-bust." Before presenting any testimony, the State made an application to the trial court to have the courtroom closed during the testimony of Detective Willie Michael Dotson, who had worked and was working as an undercover officer. A hearing was held, outside of the jury's

presence, to determine whether the courtroom should be closed during the detective's testimony.[1] The following summary is taken from the transcribed minutes of that hearing (Appendix F).

Detective Dotson, whose role in undercover drug buy-and-bust operations was exclusively as an undercover officer, testified that he was then assigned to a Bronx TNT (Tactical Narcotics Team) within the 41st precinct — the area where the drug sale at issue occurred. He expected to go back out to that area to perform his duties on either the day of his testimony or the day after. Less than one week before the hearing, Detective Dotson had purchased drugs at the same location as that involved in 1006 Intervale Avenue in the Bronx, and he estimated that within the year he had purchased drugs approximately twenty times in the area of that building. He had been working within that precinct for about one month and expected to work in that area for six months.

Detective Dotson feared that were he recognized as a police officer, his safety and that of his fellow officers would be jeopardized. In the past, Detective Dotson had been approached in the Bronx by ex-defendants or others, who had tried to tell other people that he was a police officer. No one had specifically approached him in this case. The detective had testified with respect to closing the courtroom in every case in which he was a part.

Defense counsel argued that the fact that an undercover officer worked a certain area repeatedly did not justify such fear and that he "kn[e]w of only one undercover officer ever getting

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[1] No other application for closure was made, and the trial was open for all other proceedings.

shot in this County." Defense counsel also disputed the officer's assertion that any witness had ever been previously injured.

The court characterized counsel's attitude concerning the safety of undercover officers as "cavalier," yet agreed that generalized subjective fear does not justify closure. The court found, however, that there were specific factors in this case justifying closure of the courtroom during the undercover officer's testimony, *i.e.*, that the detective just made a purchase of drugs at the same location last week, that he had made twenty purchases in the area in the last year, and that he expected to be in the area for the next six months. For those reasons, the court closed the courtroom during Detective Dotson's testimony.

B. The Judgment of Conviction

By a judgment of the Supreme Court of the State of New York, Bronx County, rendered August 20, 1991, respondent (hereinafter "defendant") was convicted, after a jury trial, of Criminal Sale of a Controlled Substance in the Third Degree (New York Penal Law § 220.39[1]), Criminal Possession of a Controlled Substance in the Third Degree (New York Penal Law § 220.16[1]), and Criminal Possession of a Controlled Substance in the Fifth Degree (New York Penal Law § 220.06[5]), and was sentenced, as a second felony offender, to an indeterminate term of imprisonment of from six and one-half to thirteen years.

The State Review Process

On March 10, 1994, defendant's conviction was unanimously affirmed on direct appeal by the Supreme Court of the State of New York, Appellate Division, First Department. People v. Ayala, 202 A.D.2d 262 (1st Dept. 1994). In his appeal, defen-

dant claimed, *inter alia*, that the trial court deprived him of his right to a public trial by improperly closing the courtroom during the testimony of the undercover police officer. Defendant claimed only that the first prong of the four-part test set forth in Waller v. Georgia, 467 U.S. 39 (1984), was violated, *i.e.*, that no "overriding interest had been established to justify closure." Holding that the trial court did not violate defendant's right to a public trial by closing the courtroom during the testimony of the undercover police officer, the Appellate Division noted as follows:

> The People provided ample justification for the closure of the courtroom during the undercover officer's testimony. The undercover officer testified that he had been working in the specific area where the crime took place for the past month; that he expected to go out there within a day after his trial testimony; that he had purchased drugs in the same building where this crime occurred just one week earlier; that he purchased drugs from the immediate area of the building about 20 times in the past year; that he "[d]efinitely" expected to go back to that area to buy drugs; that he had previously been approached by ex-defendants on the street who had attempted to warn others that he was a police officer; and that he feared for his life and safety of his fellow officers should he be recognized.

People v. Ayala, 202 A.D.2d at 262-63. The full text of the decision appears as Appendix D. On May 5, 1994, the New York Court of Appeals denied leave to that Court. People v. Ayala, 83 N.Y.2d 908 (1994) (Appendix E).

The Federal Habeas Corpus Petition

In a petition dated October 24, 1994, defendant sought a writ of habeas corpus, again alleging that he was denied his right to a public trial when the courtroom was closed during the testimony of the undercover police officer because the State had failed to advance an overriding interest that was likely to be prejudiced. For the first time *in any forum* defendant also argued that the closure was broader than necessary, that the trial court failed to consider reasonable alternatives, and that the trial court failed to make adequate findings to support the closure.

The District Court's Order

In an opinion and order entered on June 21, 1995, United States District Judge John F. Keenan ruled that the defendant's constitutional right to a public trial was not infringed by the courtroom closure. Noting that the right to a public trial is not absolute, Judge Keenan found that the closure satisfied the four-part test established by this Court in Waller v. Georgia, 467 U.S. 39 (1984).

Recognizing that criminal trials are presumptively open, Judge Keenan found that the State had established an overriding interest in justifying closure — the first prong of the Waller test — based on the individual facts of defendant's case and the particularized testimony of Officer Dotson. Noting that the safety of a witness can constitute an overriding interest, Judge Keenan concluded that the specific testimony of Detective Dotson, that he was still working as an undercover officer, that he definitely expected to return to the specific area of defendant's arrest to buy further drugs, and that he feared for his life and safety should he be recognized, constituted an overriding interest.

In addition to finding that the closure was no broader than necessary and that the trial court made adequate findings on the record to support closure (the second and fourth prongs of the Waller test), Justice Keenan addressed the third prong of Waller — that a court consider "reasonable alternatives" to closing the proceedings. Judge Keenan noted that, at trial, defendant had an opportunity to suggest reasonable alternatives, but failed to offer any. He also pointed out that defendant had still not offered any such alternatives. Thus, Justice Keenan declined to "impose a burden on courts to *sua sponte* invent alternatives," especially where there was no indication that any reasonable alternatives to closure existed.

The full text of this decision appears as Appendix C.

The First Court of Appeals Opinion

On July 15, 1996, the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded for the issuance of a writ of habeas corpus. Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996).

The Court, while acknowledging that it is "undisputed that the State has an overriding interest in protecting the safety, as well as the confidentiality, of its undercover officers," found that the State had failed to establish the existence of a "substantial probability" that an overriding interest would have been prejudiced by the officer's testimony in open court. The Court stated that had the officer testified that the defendant's associates or other residents of the neighborhoods in which the officer performed undercover work were likely to be present in the courtroom, it would have had "no difficulty inferring a substantial probability of likely prejudice."

The Court stated that it could not agree with the District Court's finding that the state court was under no obligation to *sua sponte* invent alternatives when the defendant himself never proposed any. Rather, the Court held that the trial court was under an absolute duty to consider reasonable alternatives, whether or not any were proposed by the defendant. The Court suggested that the undercover officer could have testified behind a screen.

The full text of this decision appears as Appendix B.

The Second Court of Appeals Opinion

On December 11, 1996, the United States Court of Appeals for the Second Circuit granted the State's petition for rehearing and, consistent with, but based on reasoning somewhat different than, the July 15, 1996 decision, reversed the District Court's denial of defendant's petition for a writ of habeas corpus. Ayala v. Speckard, 102 F.3d 649 (2d Cir. 1996).

The Court essentially adhered to its holding that the trial court's "failure to consider alternatives to closure violated the commands of the Supreme Court," and did not address whether in the circumstances of this case Detective Dotson's open court testimony would have presented a "substantial probability" of prejudice to the State's interest in minimizing the risk to the detective.

The Court expressly rejected the State's argument, which has been adopted by the New York Court of Appeals in People v. Martinez, 82 N.Y.2d 436, 444 (1993),[2] that a trial court does not have to consider alternatives to closure unless the party object-

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[2] The text of Martinez appears as Appendix G.

ing to closure suggests them. Initially, the Second Circuit opined that the language in Waller suggests that a trial court is required to consider alternatives whether or not the defendant makes any suggestions. Second, the Court emphasized that the right to a public trial is at least as strong as the First Amendment guarantee and that, in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 4, 14 (1986), this Court reversed a courtroom closure in part because the lower court failed to consider alternatives short of complete closure, even when the courtroom was closed pursuant to an unopposed motion. Third, the Court found that implicit in Waller's command that courtroom closure be no broader than necessary is the requirement to consider less broad measures. Fourth, the Court held that there were "numerous alternatives that were never considered," such as having a strategically placed chalkboard in the courtroom to conceal the officer's identity, having the defendant ask whom he wanted in the courtroom and then have the State show why that person should not be present, or disguising the officer's identity. However, the Court acknowledged that, from its appellate perspective, it could not say whether any of those alternatives were feasible. Fifth, the Court held that, because courtrooms are presumptively open, even if the party opposing closure of the courtroom does not suggest alternatives, the court must *sua sponte* consider such alternatives.

The full text of this decision appears as Appendix A.

Reasons for Granting the Writ

POINT

BECAUSE THE UNITED STATES COURT OF APPEALS AND THE NEW YORK COURT OF APPEALS ARE NOW IN CONFLICT REGARDING THE PROCEDURE BY WHICH A COURTROOM CAN BE CLOSED, AND BECAUSE THIS CONFLICT HAS ALREADY DISRUPTED AND WILL WREAK HAVOC WITH THE ADMINISTRATION OF JUSTICE AS IT PERTAINS TO NUMEROUS DRUG CASES IN NEW YORK STATE, THE INSTANT CASE IS OF SUCH EXTRAORDINARY IMPORTANCE THAT REVIEW BY THIS COURT IS WARRANTED.

The United States Court of Appeals for the Second Circuit stated, without ambiguity, that it was rejecting the highest New York State court decision on the subject of courtroom closure, People v. Martinez, 82 N.Y.2d 436, 444 (1993), by holding that a trial court must, *sua sponte*, expressly consider alternatives to closure under all circumstances, irrespective of whether any party articulates feasible alternatives. Ayala v. Speckard, 102 F.3d 649, 653 (2d Cir. 1996). Because the Second Circuit Court of Appeals has decided an important federal question in a way conflicting with the court of last resort in New York State, this Court should exercise its authority and grant this petition for a writ of certiorari. See U.S. Sup. Ct. Rule 10a; Braxton v. United States, 500 U.S. 344, 347 (1991) (a principal purpose for United States Supreme Court certiorari jurisdiction is to resolve conflicts among the United States court of appeals and the state courts concerning the meaning of provisions of federal law). Additionally, certiorari is also warranted because the decision of

the Second Circuit conflicts with that of another circuit, and represents an unwarranted extension of this Court's precedent.

In People v. Martinez, 82 N.Y.2d at 441, also a "buy-and-bust" drug case, the New York Court of Appeals stated that defendants and society at large have a "vital stake" in public trials and that a trial court's discretion to exclude the public should only be exercised "sparingly."[3] While cognizant of those important concerns, the New York Court held that based on the record presented in that case, the trial court did not err by not considering alternatives to closure during the undercover officer's testimony. Id., at 444. The Court noted that the alternatives to closure — placing a guard at the door who could admit only those persons posing no threat to the officer; having the defendant submit a list of family members or others he wanted at the trial; having the undercover officer testify behind a screen — had only been set forth on appeal, not at the trial level. Id., at 444. The Court observed that there had been no unidentified spectators in the courtroom from the time the trial started and that the defendant made no mention of friends or family he wished to have in attendance. Although the Court believed that the alternatives suggested on appeal, such as stationing a guard at the door, taking names, or using a screen, might be investigated in future cases, the failure to explicitly

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[3] The New York Court of Appeals decision in Martinez concerned two separate trials of two defendants. Although Martinez is the named case, the third prong of Waller, regarding alternatives to closure, which is the issue relevant to this petition, was only an issue in People v. Howard Pearson, 82 N.Y.2d 436 (1993), the companion case to Martinez. The third prong of Waller was not an issue in Martinez since the facts in that case were not sufficient to meet the first "overriding interest" prong of Waller. See People v. Martinez, 82 N.Y.2d at 443.

consider those alternatives was not error given the trial record of the case before it. Id.

Because the record in the instant case is similarly devoid of anything that might have warranted the trial court to have, *sua sponte*, articulated alternatives to closure during the undercover officer's testimony, and because no such alternative was raised by defense counsel, under New York law closure here was properly granted without any consideration of such alternatives.

However, the Second Circuit has now ruled that to pass constitutional muster,[4] a trial court must state on the record that it was considering alternatives — perhaps placing a disguise over the officer's head or placing a screen in front of him — whether or not the defense or the prosecution proposed any such alternatives. Ultimately, Ayala mandates that, where the trial record reveals only an empty courtroom and where the defendant himself says nothing about any preference for a screen or a disguise, the trial court must either require the witness to wear a disguise (or such other device for hiding identity) or state on the record that it considered such an alternative. Indeed, the Second Circuit's second Ayala decision acknowledged that it was requiring a trial court to expressly consider alternatives even where the record in a given case may reveal them to be not feasible. Ayala v. Speckard, 102 F.3d at 653. Thus, the New

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[4] It must be noted that in responding to defendant's petition in District Court and then to his appeal to the Second Circuit, the State argued that since defendant only litigated the first ("overriding interest") Waller prong at trial and in his direct state court appeal, defendant's third ("reasonable alternative") Waller prong claim was unexhausted but forfeited from Federal habeas review pursuant to Teague v. Lane, 489 U.S. 288 (1989). Both of those Courts rejected this argument.

York Court of Appeals and the circuit court are squarely in conflict.

Moreover, the rule adopted by the circuit court, which assumes that a party opposing closure would welcome an alternative, has been criticized by members of the court that propounded it. In Pearson v. James, ___ F.3d ___, 1997 WL 33521 (2d Cir. January 30, 1997) (Newman, CJ., Jacobs, Cabranes, JJ.),[5] the state court closed the courtroom during the testimony of an undercover officer without considering alternatives to closure. The Second Circuit, on those facts, reversed the District Court and granted the writ, holding that Ayala required that result. However, in its opinion, the Court acknowledged that the alternatives to closure might well have been disadvantageous to the defendant. For example, a screen might imply to a jury that a defendant has dangerous friends among spectators and a disguise might impair a jury's ability to assess the credibility of the undercover officer.

Further, in their concurrence to Pearson, Judges Jacobs and Cabranes subscribed to the opinion of the Court that, pursuant to Ayala, they were "compelled by [their] newly-minted precedent in Ayala" to grant the writ absent the trial court's *sua sponte* consideration of alternatives to closure during the undercover officer's testimony. Yet, they expressly disagreed with Ayala, by noting that Pearson had been the third case in

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[5] Ironically, Pearson was the companion case at the New York Court of Appeals to People v. Martinez, 82 N.Y.2d 436 (1993). As noted previously, (see fn. 3, supra), it was in the Pearson case that the New York Court of Appeals ruled that a trial court did not commit error by not, *sua sponte*, considering alternatives to closure during the testimony of an undercover officer. The text of the Second Circuit's decision in Pearson appears as Appendix H.

recent days wherein the Second Circuit was forced to grant a writ based on Ayala (the other two being Ayala and Okonkwo v. Lacy, 104 F.3d 21 (2d Cir. 1997)). The concurring Judges discussed how the very alternatives listed by the Court in Ayala (such as a disguise worn by the undercover officer) seemed more problematical and prejudicial to the defendant than what was actually done, and that, remarkably, had any of those alternatives actually taken place, there might have been a stronger case for habeas relief. The Pearson concurrence also voiced dismay at Ayala's purported reliance on Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) ("Press-Enterprise II"), by noting that Press-Enterprise II concerned the public's First Amendment right of access to criminal proceedings. By contrast, the courtroom closure at issue in Ayala and Pearson concerned the Sixth Amendment right to a public trial. While Press-Enterprise II reversed a courtroom closure where the trial court did not *sua sponte* consider alternatives, the Pearson concurrence distinguished the First and Sixth Amendment situations by stating that "[t]he consideration of alternatives sua sponte is more readily viewed as a necessary precaution in the First Amendment context, where often the parties asserting the constitutional right (usually the press and public) are not direct parties to the case."[6]

The Pearson concurrers were also aware that the New York State courts "have adopted a contrary principle, People v. Martinez, 82 N.Y.2d 436, 444 (1993) (Kaye, C.J.), and seem perfectly ready to adhere to it, notwithstanding the Ayala

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[6] Echoed by one commentator on Ayala, who noted that "The notion . . . that this was nothing more than a 'straightforward application' of controlling constitutional standards seems less than entirely clear." Fisher, Steven W. " 'Ayala': Closing the Court in Narcotics Cases," New York Law Journal, January 23, 1997, p. 1, col. 1.

decision." Indeed, New York law generally requires that in the event of a conflict between the state high court and an intermediate Federal appellate court on a constitutional issue, the ruling of the state Court of Appeals must be followed by the lower state courts. People v. Joseph, 85 A.D.2d 546 (1st Dept. 1981); see also People v. Kin Kan, 78 N.Y.2d 54, 60 (1991) (while interpretation of Federal constitutional question by lower Federal court may serve as useful and persuasive authority, it is not binding on New York Court of Appeals).

Consequently, the intermediate state appellate courts (and needless to say the trial courts where this scenario plays itself out on a daily basis) have specifically declined to follow the Second Circuit's decision in this case. Rather, they have followed the rule set forth by the New York Court of Appeals in Martinez. See People v. Brown, ___ A.D.2d ___, 1997 WL 30680 (N.Y.A.D. 1 Dept. January 28, 1997) (intermediate appellate court stated that to the extent facts fell within parameters of People v. Martinez and recent conflicting decision of Ayala v. Speckard, it would follow Martinez); People v. Ford, ___ A.D.2d ___, 1997 WL 24328 (N.Y.A.D. 1 Dept. January 21, 1997) (court holds that, despite Second Circuit's decision in Ayala, trial court was not required to consider alternates to closure since defendant did not suggest any); People v. Pepe, ___ A.D.2d ___, 1997 WL 7024 (N.Y.A.D. 1 Dept. January 9, 1997) ("[t]o the extent that Ayala v. Speckard (89 F.3d 91) might require a different result, we decline to follow that case"); People v. Bowden, ___ A.D.2d ___, 651 N.Y.S.2d 453 (1st Dept. 1996) (intermediate appellate court expressly follows New York Court of Appeals decision of People v. Martinez, but states that it would reach the same result if it followed Ayala v. Speckard); People v. Lugo, ___ A.D.2d ___, 650 N.Y.S.2d 102 (1st Dept. 1996) (notes that to the extent that facts of case fall within parameters of both Martinez and the Second Circuit's

recent conflicting holding in Ayala v. Speckard, it is Martinez that controls); People v. Rivera, ___ A.D.2d ___, 649 N.Y.S.2d 413, 414 (1st Dept. 1996) (appellate court noted that, while trial court considered alternatives to closure and that closure in particular case was warranted under Second Circuit's decision in Ayala v. Speckard, interpretation of Federal constitutional question was not binding in New York state court); People v. Nieves, ___ A.D.2d ___, 648 N.Y.S.2d 583 (1st Dept. 1996) (citing Martinez, appellate court found that based on record it could not be said that Trial Justice erred in failing to consider alternative measures to closing courtroom during undercover officer's testimony); People v. Richards, ___ A.D.2d ___, 1997 WL 34897 (N.Y.A.D. 2 Dept. January 27, 1997) (trial court held not to have obligation to consider alternatives to closure during testimony of undercover officer).

Thus, absent intervention by this Court, the finality of all convictions wherein the New York State trial courts have correctly followed their highest court in closing the courtroom, as well as those cases in the future relying on the New York Court of Appeals decision, will be in grave peril. Given the many drug cases depending on the work of undercover officers that will likely present the same issue as presented by this case, the result of the split in opinion between the New York Court of Appeals and the Court of Appeals for the Second Circuit will be catastrophic to the administration of justice in New York.

Still further, the Second Circuit's view that a trial court must, *sua sponte*, consider alternatives to closure, is also in direct conflict with that of another United States court of appeals. The Third Circuit has clearly held that those who object to closure have the responsibility of showing to the court's satisfaction that alternate procedures are available that would eliminate the dangers shown by the party seeking closure. United States v.

Raffoul, 826 F.2d 218, 225 (3d Cir. 1987). Justice Powell has shared this view. See Gannett Co. Inc. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring) (those who object to courtroom closure have burden of demonstrating that alternative procedures are available). See also Pearson v. James, supra (concurring opinion) (noting that Justice Powell and the Third Circuit do not share the Second Circuit's view set forth in Ayala). Thus, there is a conflict between the federal circuits on this issue. This conflict between the circuits also warrants the granting of this petition. See U.S. Sup. Ct. Rule 10a.

Finally, it should also be noted that although the above discussion pertains only to the Second Circuit's decision as it relates to the third ("reasonable alternative") prong of Waller v. Georgia, 467 U.S. 43 (1984), in its two decisions in this case, the Second Circuit espoused a standard of review for the first Waller prong (that the party seeking closure must advance an overriding interest that is likely to be prejudiced) that conflicts with that set forth by this Court. In this case, the Second Circuit, citing Press-Enterprise II, 478 U.S. at 14, stated that "the Supreme Court has made clear that there must be a `substantial probability' that the [overriding] interest in question will be prejudiced by open testimony." Ayala v. Speckard, 89 F.3d at 95.[7] However, as noted previously, Press-Enterprise II concerned the public's First Amendment right of access to criminal

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[7] The second decision in the instant case also unequivocally maintained that the "substantial probability" standard was the correct standard of review when evaluating the first "overriding interest" prong of Waller. However, in that decision the Second Circuit explicitly stated that it was reversing the District Court's denial of the petition for a writ of habeas corpus solely based on its belief that the failure of the trial court to consider alternatives to closure, *sua sponte*, constituted a violation of Waller's third prong. Ayala v. Speckard, 102 F.3d at 652.

proceedings. By contrast, Waller, like the instant case, was a Sixth Amendment case, wherein the defendant objected to closure of the courtroom. Here, as discussed, the prosecution sought only the temporary closure of the courtroom to protect the safety of the undercover police officer. In the Sixth Amendment context, this Court set forth the standard that the party seeking closure must advance an overriding interest that is "likely to be prejudiced" if closure is not permitted. Waller v. Georgia, 467 U.S. at 48. The Second Circuit's decision in this case did not follow the "likely to be prejudiced" standard for Sixth Amendment cases plainly set forth in Waller, but instead, used the more rigorous "substantial probability of prejudice" standard set forth in the First Amendment case of Press-Enterprise II. This plain difference with Waller also warrants the granting of this petition for certiorari. See U.S. Sup. Ct. Rule 10c.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 3, 1997

APPENDIX A

APPENDIX A

Opinion upon rehearing of the Court of Appeals for the Second Circuit

Published at 102 F.3d 649 (2d Cir. 1996)

Steven AYALA, Petitioner-Appellant,

v.

Hubert SPECKARD, Superintendent of Groveland Correctional Facility, Respondent-Appellee.

No. 1304, Docket 95-2463.
United States Court of Appeals,
Second Circuit.
Petition for Rehearing Submitted July 29, 1996.
Decided Dec. 11, 1996.

Before: CARDAMONE, ALTIMARI and PARKER, Circuit Judges.

Petition for rehearing by respondent-appellant of the July 15, 1996 decision, 89 F.3d 91 (2d Cir. 1996), is granted. Based on reasoning that is somewhat different than our decision issued on July 15th, the district court's denial of petitioner-appellee's petition for a writ of habeas corpus is reversed. Petitioner-appellee is to be released from custody if he is not retried within a reasonable time.

PER CURIAM.

I. BACKGROUND

In our initial opinion in this case, 89 F.3d 91 (with which we assume familiarity), we reversed the district court's denial of Ayala's petition for a writ of habeas corpus and remanded for issuance of the writ. We reasoned that under the standards established in *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("Press-Enterprise I"), and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("Press-Enterprise II"), Ayala was deprived of his Sixth Amendment "right to a ... public trial" (made applicable to the states by the Fourteenth Amendment, *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507-08, 92 L.Ed. 682 (1948)) when the state trial court closed the courtroom for the testimony of Detective Dotson, the undercover police officer to whom Ayala sold crack cocaine.

The State has petitioned us to rehear the case. The New York State District Attorneys Association has filed an amicus brief also urging us to rethink our initial opinion. Both the State and the District Attorneys argue that our initial opinion improperly created and applied retroactively a new rule of constitutional criminal procedure in violation of *Penry v. Lynaugh*, 492 U.S. 302, 313-14, 109 S.Ct. 2934, 2943-44, 106 L.Ed.2d 256 (1989) (adopting the plurality's opinion in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). We ordered responsive briefing from Ayala's counsel, the Office of the Appellate Defender, addressing whether our opinion improperly applied a new rule of constitutional law.

Having considered the arguments contained in these briefs, we grant the petition for rehearing and address herein the issues. As explained further below, we remain convinced that our initial opinion was correctly decided.

II. DISCUSSION

There are two sources of the presumption that criminal court proceedings are open to the public. The First Amendment implicitly vests the public with a right of access to the courthouse, *see Press-Enterprise* II, 478 U.S. at 7, 106 S.Ct. at 2739-40, and the Sixth Amendment explicitly guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... public trial." U.S. Const. amend. VI. The Sixth Amendment's public trial guarantee is at least as strong as the First Amendment's. *Waller*, 467 U.S. at 46, 104 S.Ct. at 2215 ("there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."). Furthermore, whether the right stems from the First or Sixth Amendment, the "public-trial guarantee [is] for the benefit of the defendant." *Id.* Lastly, while some State interests may justify courtroom closure, "[s]uch circumstances will be rare, however, and the balance of interests must be struck with special care."[1] *Id.* at 45, 104 S.Ct. at 2215.

As we explained in our initial opinion, there are four things that must occur before a courtroom can be closed without violating the Sixth Amendment:

> (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced,

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[1] The Supreme Court's observation that courtrooms should be closed to the public only rarely casts an interesting light on what appears to be a relatively common practice in New York courts. The District Attorneys tell us that they have located at least ninety "otherwise final" state court decisions in which courtrooms have been closed. Ayala's counsel suggests the majority of these closures occurred in "buy and bust" cases such as this one.

> (2) the closure must be no broader than necessary to protect that interest,
>
> (3) the trial court must consider reasonable alternatives to closing the proceeding, and
>
> (4) it must make findings adequate to support the closure.

Waller, 467 U.S. at 48, 104 S.Ct. at 2216 (numbering added) (applying the First Amendment standard enunciated in *Press-Enterprise I* to the Sixth Amendment context). In our initial opinion, we held Ayala's courtroom closure to be unconstitutional for two alternative reasons. First, we concluded the prosecution failed to satisfy the first *Waller* element (showing sufficient probability of prejudice to a sufficiently serious interest). Second, we ruled that the state court's failure to consider alternatives to closure of the proceedings violated the third *Waller* element. As indicated above, the State now argues that both rationales contravene the nonretroactivity rule of *Teague*.

A. *The State's failure to argue that petitioner sought a new rule of constitutional criminal procedure waives that argument.*

The State concedes that it has not argued until now that a ruling favorable to Ayala would create a new and impermissible rule of constitutional criminal procedure. This failure is significant in light of the fact that our initial opinion did not diverge from positions urged by Ayala. *Compare* 89 F.3d at 95 ("[t]he state may not subjugate Ayala's constitutional protections to the mere possibility that someone with the ability and inclination to injure Dotson will be present in the courtroom

during his brief testimony.") *with* Appellant's Brief at 13 (arguing that "it is not enough for the movant to establish a theoretical possibility of harm; even a `reasonable likelihood of substantial prejudice' is not sufficient.") (citing *Press-Enterprise II*, 478 U.S. at 14, 106 S.Ct. at 2743); *compare also* 89 F.3d at 96 (disagreeing with district court's ruling that trial judges are not obligated to consider alternatives to closure *sua sponte*) *with* Appellant's Brief at 25 ("*Waller* does not place the onus of suggesting alternatives upon the defendant. Instead, `*the trial court* must consider reasonable alternatives to closing the proceeding.' ") (citing *Waller* 467 U.S. at 48, 104 S.Ct. at 2216) (emphasis added by appellant). Thus, the State knew the position urged by Ayala. The State argued that Ayala's interpretation was incorrect. But the State never argued that if we agreed with Ayala, we would be contravening the rule of *Teague*.[2]

The Supreme Court has said

> A threshold question in every habeas case, therefore, is whether the court is obligated to apply the *Teague* rule to defendant's claim. We have recognized that the nonretroactivity principle is not `jurisdictional' in the sense that federal courts must raise and decide the issue *sua sponte*. Thus, a federal court may, but need not, decline to apply *Teague* if the State does not argue it.

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[2] The difference between arguing that a certain interpretation of a Supreme Court opinion is incorrect and arguing that that interpretation would be new may not be obvious. The former involves analysis of the Supreme Court's words. The latter involves analysis of the Supreme Court's words *and* whether the interpretation which that analysis produces reflects a new principle.

Caspari v. Bohlen, 510 U.S. 383, 389, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994) (citations, quotation marks, emphasis, and ellipsis omitted). As discussed below, we conclude that out initial opinion broke no new constitutional ground. But the State concedes, as it must, that it has never raised the *Teague* issue until now. The *Teague* question is thus waived. *Ciak v. United States*, 59 F.3d 296, 302 (2d Cir. 1995).

B. *Even if the Government did not waive the* Teague *argument, the initial opinion does not break new constitutional ground.*

"A case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994) (brackets omitted) (citing *Teague*). The reason for this rule is bottomed on the purpose of federal collateral review: "to create an incentive for state courts to conduct their proceedings in a manner consistent with established constitutional standards." *Wright v. West*, 505 U.S. 277, 311, 112 S.Ct. 2482, 2500, 120 L.Ed. 225 (1992) (Souter, J., concurring) (citations and internal quotation marks omitted). Everyone agrees in this action that *Waller* and both *Press Enterprise* cases were "existing precedent" during the relevant state court proceedings. As discussed below, we see the original opinion in this case as a straightforward application of the constitutional standards enunciated in those cases.

1. *Substantial Probability of Prejudice to an Overriding Interest.*

In our initial opinion, we restated the rule that before a request to close a courtroom can overcome the constitutional presumption of a public trial, the party seeking to close the courtroom

must show a "substantial probability" that an "overriding interest" will be prejudiced. 89 F.3d at 95. Applying that rule to the case before us, we recognized that the safety of law enforcement personnel constitutes an "overriding interest." *Id.* We ruled, however, that the state failed to show a "substantial probability" that Detective Dotson's safety would be prejudiced by testifying in open court. It bears emphasizing that we in no way directed that undercover agents identify themselves in each and every trial; we merely directed that the trial court find after sufficient argument or hearing that there was a "substantial probability" that by testifying in open court the undercover agent's safety would be endangered, or that such a substantial probability reasonably can be inferred from facts put forward by the state. *Id.* at 96.

The State continues to argue that Detective Dotson's safety would have been exposed to a substantial probability of prejudice if the courtroom had not been closed. While we continue to disagree with the State's argument, the District Attorneys in their amicus brief proffer another interest which they claim is overriding and was subject to an undue probability of prejudice--the interest in maintaining the effectiveness of a law enforcement agent acting in an undercover capacity.

As indicated in our original opinion, the work of undercover law enforcement personnel is often invaluable and thanklessly dangerous. Accordingly, we agree that the government's interest in managing the risk to its undercover agents is "overriding." Assuming *arguendo* that the government's interest in minimizing the risk of compromising the effectiveness of Detective Dotson as an undercover agent is different from its interest in ensuring his safety, our original opinion did not address whether the State had established a substantial probability of prejudice to its interest in minimizing that risk had Dotson been required to testify in open court.

In any event, as discussed below, we continue to hold that the court's failure to consider alternatives to closure violated the commands of the Supreme Court--assuming *arguendo* that the State has not waived its *Teague* argument. Therefore, we do not now address whether in the circumstances of this case Detective Dotson's open court testimony would have presented a substantial probability of prejudice to the State's interest in minimizing the risk to Detective Dotson.

2. *Consideration of Alternatives.*

The State also argues that our alternative rationale for reversing the district court's denial of the writ (i.e., that the court failed to consider less drastic alternatives to full closure during Detective Dotson's testimony) constituted an inappropriate expansion of *Waller*. Specifically, the State argues that the Sixth Amendment does not burden the court to consider alternatives to complete closure unless the party objecting to closure suggests reasonable alternatives. We reject the State's argument, which has been adopted by the New York Court of Appeals, *see People v. Martinez*, 82 N.Y.2d 436, 444, 604 N.Y.S.2d 932, 624 N.E.2d 1027 (1993), for at least five reasons.

First, in *Waller* the Supreme Court, after reciting the four things that must occur prior to courtroom closure, addressed the trial court's failure to consider reasonable alternatives. "The court did not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure, *in camera* if necessary, and closing only those parts of the hearing that jeopardized the interests advanced." 467 U.S. at 48-49, 104 S.Ct. at 2217-17. The words following the colon in the just-quoted sentence can only be read as examples of "consider[ing] reasonable alternatives." But nothing in *Waller* suggests that the party opposing courtroom

closure--in that case the defendant--made any such suggestion, other than a general objection.[3]

Second, we emphasized above and reemphasize here that the Sixth Amendment guarantee to a public trial is at least as strong as the First Amendment guarantee. In *Press-Enterprise II*, a First Amendment case, the Supreme Court reversed a courtroom closure in part because the lower court "failed to consider whether alternatives short of complete closure would have protected the interests of the" party seeking to close the proceedings. 478 U.S. at 14, 106 S.Ct. at 2743. Significantly, in that case the courtroom was closed pursuant to an unopposed motion. 478 U.S. at 4, 106 S.Ct. at 2738. No one suggested any alternatives because the State and the accused agreed that they wanted the proceeding closed. Nonetheless, the Supreme Court reversed. Because the First Amendment requires consideration of less restrictive alternatives even absent a suggestion of such alternatives, and because the Sixth Amendment is at least as

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[3] The State cites a concurring opinion of Justice Powell in *Gannett Co. v. DePasquale*, 443 U.S. 368, 401, 99 S.Ct. 2898, 2916-17, 61 L.Ed.2d 608 (1979) for the proposition that at least one Supreme Court Justice held the view that those who object to closure have the responsibility of showing that alternatives to closure are available. It should be pointed out that the *Waller* decision, which was also authored by Justice Powell for the Court, was decided after *Gannett* and is controlling. It could well be that Justice Powell altered his view in the interim. Moreover, *Gannett* was a case where the defendants sought closure in order to preserve their Eighth Amendment right to a fair trial in light of extensive pre-trial publicity. Justice Powell suggested that once the defendant showed that fairness would likely be prejudiced, if the press objected to closure, it should propose alternatives. *Waller* and this case, on the other hand, involved the defendant's right to a public trial which is guaranteed by the Sixth Amendment. Nothing in Justice Powell's *Gannett* concurrence suggests the defendant must make a showing of alternatives to protect that right.

protective of the public trial as the First Amendment, the Sixth Amendment also does not require the party seeking to keep the courtroom open to suggest alternatives to full closure.

Third, *Waller* makes clear that courtroom closure must be no broader than necessary. 467 U.S. at 48, 104 S.Ct. at 2216-17. Implicit in that command is the requirement to consider measures less broad than complete closure. It would be odd indeed to require an accused who is insisting upon his right to a public trial to also propose alternatives to a completely public trial in order to preserve any objection to its closure.

Fourth, there are numerous obvious alternatives that were never considered. For example, a strategically placed chalkboard may have allowed the public into the courtroom without seeing the identity of the undercover officer. Another approach might have been to ask Ayala who he wanted in the courtroom, then cause the State to show why any such person should not be present. *See, e.g., Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir.1994). Still another approach could have been for Detective Dotson to have concealed his identity in some other manner, such as disguise. From our appellate perspective we cannot say whether any of these less broad alternatives were feasible. But there was zero consideration given to them. We also recognize that these alternatives may indeed be cumbersome. But the Supreme Court in *Press-Enterprise II* specifically relied on the existence of less drastic, albeit "cumbersome," alternatives which the lower court had not considered. 478 U.S. at 15, 106 S.Ct. at 2743-44.

Fifth, and perhaps most importantly, the Supreme Court has unmistakably held that courtrooms are presumed to be open. *Press-Enterprise I*, 464 U.S. at 510, 104 S.Ct. at 824. For that presumption to mean anything, the party seeking to close the court must have the burden of insuring that the court adequately addresses constitutional concerns. If those concerns are not properly addressed it is appropriate for the party seeking to

deviate from the constitutional norm, here the State, to bear the risk of reversal on appeal. If the party seeking to close the courtroom does not assist the court in considering alternatives, then, as we stated before, the court must *sua sponte* consider such alternatives.

III. CONCLUSION

Efficient law enforcement and the right to a public trial may at times be incompatible. The guarantees found in the Bill of Rights carry societal costs. The costs of the public trial right are most dramatic where, as here, the trial court did not take proper steps at the time the courtroom was closed. But having failed to have considered, and adopted if feasible, less drastic alternatives, the courtroom closure in this case violated the Constitution. We are aware of the scourge of illegal drugs in our society, and the importance of governmental efforts to fight their proliferation. But those efforts do not independently justify improper courtroom closure.

Consistent with our original opinion, we reverse the district court's denial of Ayala's petition for a writ of habeas corpus. Ayala is to be released from custody if he is not retried within a reasonable time. The mandate is to issue forthwith.

APPENDIX B

APPENDIX B

Original Opinion of the Court of Appeals for the Second Circuit

Published at 89 F.3d 91 (2d Cir. 1996)

Steven AYALA, Petitioner-Appellant,

v.

Hubert SPECKARD, Superintendent of Groveland Correctional Facility, Respondent-Appellee.

No. 1304, Docket 95-2463.
United States Court of Appeals,
Second Circuit.
Argued May 9, 1996.
Decided July 15, 1996.

Before: CARDAMONE, ALTIMARI and PARKER, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Keenan, J.), denying appellant's petition for a writ of habeas corpus.

Reversed and remanded.

ALTIMARI, Circuit Judge:

Petitioner-appellant Steven Ayala ("Ayala") was arrested as a result of an undercover "buy and bust" operation by state police officers in the Bronx, New York. At trial, the state prosecutor sought to have the courtroom closed during the police officer's testimony so as not to jeopardize the safety and efficacy of the officer's future undercover operations. The state

court judge granted the closure and allowed the officer to testify absent the scrutiny of the public. Ayala unsuccessfully appealed his conviction through the state system, asserting that the courtroom closure violated his Sixth Amendment right to a public trial. Thereafter, Ayala sought a writ of habeas corpus in the United States District Court for the Southern District of New York (Keenan, J.). The district court found Ayala's contentions unavailing and denied the writ. Ayala now argues, *inter alia*, that the district court erred in denying the writ of habeas corpus because the State failed to advance an interest that was likely to be prejudiced by the undercover officer's open testimony. Because we agree that there was no "substantial probability" that an overriding state interest would have been prejudiced by the public testimony of the undercover officer, we reverse the judgment of the district court and remand for issuance of the writ.

BACKGROUND

In his first two years of undercover work, Detective Willie Dotson ("Dotson") made approximately two hundred purchases of illicit drugs. During that period of time, Dotson and a team of officers engaged in what are known as "buy and busts"--Dotson, undercover, would purchase drugs with pre-marked bills, identify the individual from whom he had bought the drugs to his team members, and those officers in his team would then arrest the offending individual.

One such "buy and bust" arrest took place on September 22, 1990, moments after Ayala allegedly sold Dotson ten dollars worth of crack cocaine. Ayala was tried before a jury some ten months later in the New York Supreme Court of Bronx County (Marcus, J.), and was convicted of criminal sale of a controlled substance in the third degree, see N.Y. Penal Law § 220.16[1] (McKinney Supp. 1996), and criminal possession of a controlled

substance in the fifth degree, see N.Y. Penal Law § 220.06[5] (McKinney Supp. 1996). As a second time felony offender, Ayala was sentenced to six-and-a-half to thirteen years in prison.

The principal witness against Ayala at trial was Dotson. Prior to Dotson's testimony, the State moved to close the courtroom to protect the officer's identity and well-being. Accordingly, the trial judge held a hearing to determine the propriety of closing the courtroom. In the hearing, after stating that he was an undercover officer with the 41st Precinct, Dotson testified as follows:

Q: And are you going to be working there after you testify here today or tomorrow, are you going to be going back to the 41[st] Precinct?

A: Yes, Ma'am.

Q: And do you have any idea about how long you're going to be in that area?

A: Maybe six months, it depends.

Q: Okay. And, Detective Dotson, could you please tell the Court what, if any, apprehensions you have about going to that area should you be recognized by people in an open courtroom?

A: Yes. I--if I go back to this particular area and I know I will be because I was there previously and I am recognized, I fear for my life and my safety and that of my fellow police officers due to the fact that if I am recognized.

There have been occasions where I would just say that people are injured or killed if they're recognized and if they know that you are a police officer, it has happened on occasion.

Q: Detective Dotson, have you ever personally been approached by citizens of Bronx County or ex-defendants on the street who have attempted in some way to indicate to other people that you are a police officer?

A: Yes.

On cross-examination, Dotson further testified:

Q: Detective, you testified to a general fear for you safety, is that correct; if someone were to recognize you from the courtroom, is that correct?

A: A general fear?

Q: Yes.

A: I fear for my safety.

Q: Okay. Was there anything specifically about this case, has anyone ever approached you with respect to this case if you were to testify, if you're going to testify that would cause you to have some sort of apprehension or fear for your safety?....

A: At this point, no, sir.

Q: And isn't it a fact that you testify with respect to closing the courtroom in every particular case that you do?

A: Yes, sir.

Based upon Dotson's testimony, and over the objections of Ayala's attorney, the trial judge excluded all spectators from the courtroom during Dotson's testimony.

On direct appeal, Ayala argued that the New York Supreme Court had violated his constitutional right to a public trial and that the State had failed to proffer a sufficient "overriding interest" to justify the courtroom closure. The Appellate Division rejected Ayala's Sixth Amendment challenge, stating that:

> [t]he People provided ample justification for the closure of the courtroom during the undercover officer's testimony. The undercover officer testified that he had been working in the specific area where the crime took place for the past month; that he expected to go back there within a day after his trial testimony; that he had purchased drugs in the same building where this crime occurred just one week earlier; that he purchased drugs

> from the immediate area of this building about 20 times in the past year; that he "[d]efinitely" expected to go back to that area to buy drugs; that he had previously been approached by ex-defendants on the street who had attempted to warn others that he was a police officer; and that he feared for his life and safety as well as the lives and safety of his fellow officers should he be recognized.

People v. Ayala, 202 A.D.2d 262, 608 N.Y.S.2d 642, 643 (1st Dep't 1994). Thereafter, the New York Court of Appeals denied Ayala leave to seek review of the Appellate Division's decision. *See People v. Ayala*, 83 N.Y.2d 908, 614 N.Y.S.2d 390, 637 N.E.2d 281 (1994).

On October 31, 1994, Ayala brought the present habeas corpus petition in the United States District Court for the Southern District of New York. In his petition, Ayala contended that the State had violated his Sixth Amendment rights by failing to meet all four prongs of the *Waller* test: 1) the State did not advance an overriding interest that was likely to be prejudiced by Dotson's open testimony; 2) the closure was broader than necessary to protect the State's interest; 3) the court failed to consider reasonable alternatives to closing the courtroom; and 4) the court failed to make adequate findings in support of the closure. *See Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216-17, 81 L.Ed.2d 31 (1984). The State conceded that habeas review was appropriate as to the first prong of the *Waller* test, but argued that because Ayala had not specifically disputed the other three prongs in state court that he could not do so now in his habeas petition.

The district court rejected the State's exhaustion argument but found Ayala's constitutional claim to be without merit. By opinion dated June 21, 1995, the district court held that: 1) the State had amply demonstrated likely prejudice of its overriding

interest in protecting an undercover officer's anonymity and safety; 2) because Ayala had not requested that any family members be present during Dotson's testimony, the temporary courtroom closure for Dotson's testimony was no broader than necessary; 3) the trial court was under no obligation to *sua sponte* consider alternatives to complete closure of the courtroom and therefore did not err in considering no other alternatives; and 4) the state court justified its closure with sufficient specificity on the record. Accordingly, the district court rejected Ayala's petition. Moreover, the district court denied Ayala's motion for a certificate of probable cause to appeal. On October 31, 1995, this Court granted Ayala's motion for a certificate of probable cause and allowed the present appeal to go forward.

On appeal, Ayala contends, as he has below, that his Sixth Amendment right to a public trial was violated by the closure of the courtroom during his state trial.

DISCUSSION

1. *Exhaustion*

As an initial matter, we address the State's proposition that Ayala may not appeal three of the four prongs of the *Waller* test for failure to exhaust state remedies.

In the interest of comity and in keeping with the requirements of 28 U.S.C. § 2254(b) (1994), federal courts will not consider a constitutional challenge that has not first been "fairly presented" to the state courts. *See Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971), *Daye v. Attorney General*, 696 F.2d 186, 191 (2d Cir.1982) (en banc). It is clear, however, that Ayala's Sixth Amendment challenge was "fairly presented" on direct appeal through the New York system. Not only did Ayala expressly invoke the Sixth Amendment in his arguments before the Appellate Division, *see Daye*, 696 F.2d at

192 ("Obviously if the petitioner has cited the state courts to the specific provision of the Constitution relied on in his habeas petition, he will have fairly presented his legal basis to the state courts."), he also pointed to the very case under which he now challenges the constitutionality of the courtroom closure, namely *Waller*. Despite the State's protestations, Ayala need not have raised the exact constitutional arguments in state court before challenging the constitutionality of the exact same acts under the same consitutional provision in federal court on habeas review. *See id.* at 192 n. 4.

2. *Courtroom Closure*

While not absolute, the Sixth Amendment's guarantee of a "public trial" carries with it a presumption that judicial proceedings will be open to the public. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984) ("*Press-Enterprise I*"); *Guzman v. Scully*, 80 F.3d 772, 774-75 (2d Cir.1996) (quoting *Waller*, 467 U.S. at 45, 104 S.Ct. at 2214-15). The right to a public trial is an important one, for, as the Supreme Court has stated, only with openness may " 'the public ... see [that the accused] is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions ...' " *Gannett Co. v. DePasquale*, 443 U.S. 368, 380, 99 S.Ct. 2898, 2906, 61 L.Ed.2d 608 (1979) (quoting *In re Oliver*, 333 U.S. 257, 270 n. 25, 68 S.Ct. 499, 506 n. 25, 92 L.Ed. 682 (1948)). Moreover, the presence of the public has the additional salutary effect of discouraging perjury. *See Waller*, 467 U.S. at 46, 104 S.Ct. at 2215.

In light of the importance of the Sixth Amendment right to a public trial, the Supreme Court has held that a courtroom may only be closed to the public if:

> [1] the party seeking to close the hearing ... advance[s] an overriding interest that is likely to be prejudiced,
>
> [2] the closure [is] no broader than necessary to protect that interest,
>
> [3] the trial court [has] consider[ed] reasonable alternatives to closing the proceeding, and
>
> [4] [the trial court makes] findings adequate to support the closure.

Id. at 48, 104 S.Ct. at 2216 (formatting added). On appeal, Ayala contends that the district court erred with respect to each prong of the *Waller* test. Because we find that the State failed to advance an overriding interest that was likely to be prejudiced, we reverse the district court's denial of Ayala's petition for a writ of habeas corpus.

A. *Overriding Interest*

The first prong of the *Waller* test requires that before a courtroom be closed to the public, the party seeking the closure must present evidence of an "overriding interest that is likely to be prejudiced." *Id.* Such a closure may not, however, be predicated upon the mere possibility that an interest will be prejudiced, *see United States v. Doe*, 63 F.3d 121, 130 (2d Cir.1995); rather, the Supreme Court has made clear that there must be a "substantial probability" that the interest in question will be prejudiced by open testimony, *see Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14, 106 S.Ct. 2735, 2743, 92 L.Ed.2d 1 (1986) ("Press-Enterprise II"). Moreover, the burden is upon the party seeking closure to establish the existence of a substantial probability of prejudice. *See Doe*, 63 F.3d at 130.

It is clear from the hearing testimony quoted above that the State failed to establish the existence of a substantial probability that an overriding interest would likely have been prejudiced by Dotson's testimony in open court. While it is undisputed that the State has an overriding interest in protecting the safety, as well as the confidentiality, of its undercover officers, *see United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1274-75 (2d Cir.), *cert. denied*, 423 U.S. 937, 96 S.Ct. 296, 46 L.Ed.2d 269 (1975), nothing in the record below evinces a substantial probability that testifying in Ayala's trial would have endangered Dotson's safety or blown his cover. The district court below properly determined that the *possibility* of injury existed as a result of Dotson's returning to the field after testifying openly. The mere possibility of prejudice, however, even when such important interests are at stake, is not tantamount to a substantial probability of likely prejudice and cannot justify abridging Ayala's constitutional protections in the case at hand.

Fatal to the State's assertion of likely prejudice is its failure to establish the nexus between Dotson's testimony and the ultimate compromise of Dotson's safety and cover. Although Dotson testified that he was fearful for his safety should he be required to testify in open court, he did not state any particularized fear resulting from testifying in Ayala's trial. In fact, Dotson explicitly stated that there was nothing special about the trial that made him fearful. Nor did he suggest that anyone in a position to blow his cover was likely to be in the courtroom when he testified. Rather, Dotson expressly stated that he sought courtroom closure as a matter of course whenever he testified. As a result, the State failed to establish a substantial probability that anyone observing Dotson's testimony in open court would threaten his safety or cover should he return to the field in general or even the exact location at which Ayala was arrested. *See, e.g., Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir.1994) (discussing exclusion of defendant's parents from

courtroom for fear they would disclose undercover officer's identity in retribution for son's conviction), *cert. denied*, --- U.S. ----, 115 S.Ct. 778, 130 L.Ed.2d 672 (1995); *Woods v. Kuhlmann*, 977 F.2d 74, 77 (2d Cir.1992) (discussing propriety of excluding entire family when single family member had threatened witness because remaining family members "could 'tell the other[s]' of the substance of [witness's] testimony"). The state may not subjugate Ayala's constitutional protections to the mere possibility that someone with the ability and inclination to injure Dotson will be present in the courtroom during his brief testimony. *Cf. Lloyd*, 520 F.2d at 1275 n. 1 (presence of other targets in narcotics investigation in courtroom only an "added factor," not determinative, in justifying closure). Accordingly, the district court erred in determining that the State had established a substantial probability that Dotson's safety or cover would likely be prejudiced by his testimony in open court.

To hold otherwise would establish a rule that, despite the Sixth Amendment, no undercover officer who intends to return to undercover work need testify in open court. We cannot tolerate such a rule in light of the Supreme Court's mandate that closure be justified by a "substantial probability" of prejudice. While prior to the establishment of the "substantial probability" test in *Waller* this Court stated that "shielding the identity of a[n undercover] police witness, preserving his future usefulness, and safeguarding his life provides an adequate justification for excluding the public," *Lloyd*, 520 F.2d at 1274-75, we do not believe that such a broad holding is justified any longer in light of Waller. As the *Lloyd* Court itself admitted, the mere fact that one is an undercover officer testifying in open court creates only a "risk of exposure," but not a substantial probability of exposure. *See id.* at 1275. Judges must consider courtroom closure on a case by case basis, allowing the public to be excluded only if the moving party establishes a "substantial probability" of

prejudice. The State failed to make such a showing in the case at hand.

We do not mean to suggest that Dotson's safety and anonymity are not extremely important State interests worthy of protection. The work of Detective Dotson and his colleagues is an invaluable component of law enforcement. Nor do we mean to suggest that the State could not have demonstrated a substantial probability that Dotson's safety and anonymity would likely be prejudiced by his open testimony. As this Court recently made clear, a trial court may reasonably infer a substantial probability from those facts put forward by the party seeking courtroom closure. *See Doe*, 63 F.3d at 130. "Indeed, in some circumstances it might be within a [trial] court's discretion to grant closure without evidence of a direct threat or other evidence corroborating a defendant's subjective fears," *id.*, for example in those cases involving criminal organizations in which a judge may reasonably infer the courtroom presence of interested parties with a motivation to retaliate against the witness, *see id., United States v. Scarpelli*, 713 F.Supp. 1144, 1145-46 n. 2 (N.D.Ill.1989) (noting possibility of "Godfather-style retribution"). Had Dotson suggested that Ayala's associates or other residents of the neighborhoods in which Dotson performed undercover work were likely to be present in the courtroom during his testimony, we would have no difficulty inferring a substantial probability of likely prejudice. Dotson's barren testimony in the case at hand, however, does not provide the basis for even an inference of likely prejudice.

B. *Reasonable Alternatives*

Although we need not address the third prong of the *Waller* test in light of the resolution above, it is clear that the state court did not consider reasonable alternatives to complete closure of the courtroom during Dotson's testimony. For example, Dotson

could easily have testified behind a screen, thus allowing the public at large to attend the trial without exposing Dotson's identity. *See Vidal*, 31 F.3d at 69.

More importantly, the district court in its opinion below asserted that the state court was under no obligation to "*sua sponte* invent alternatives," particularly when the petitioner never proposed any such alternatives himself. We cannot agree with this proposition. As we have repeatedly stated, "the trial court *must consider* reasonable alternatives to closing the proceeding" as a predicate to closing the courtroom. *Guzman*, 80 F.3d at 775 (emphasis added); *Vidal*, 31 F.3d at 69 (emphasis added); *Woods*, 977 F.2d at 76 (emphasis added). Therefore, prior to abridging a defendant's Sixth Amendment rights, trial courts are under an absolute duty to consider possible alternatives to complete courtroom closure. *See Press-Enterprise II*, 478 U.S. at 14, 106 S.Ct. at 2743; *Doe*, 63 F.3d at 131.

Our holding is unaffected by the recent amendments to the Habeas Corpus statutes which became law on April 24, 1996, with the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214. Assuming, without deciding, that these provisions apply retroactively to cases pending when the law was passed, the new standard for issuance of the writ does not dictate a different outcome. The new statute provides that the writ will not issue unless the petitioner establishes that the state court decision was "contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*, § 104 (amending 28 U.S.C. § 2254(d)). Here, *Waller* provides the clearly established federal law to which the state court decision was contrary.

CONCLUSION

For the reasons stated above, we reverse the judgment of the district court and remand for the issuance of a writ of habeas corpus.

APPENDIX C

APPENDIX C

Decision and Order of the United States District Court for the Southern District of New York

Unpublished opinion -- 1995 WL 373419 (S.D.N.Y.)

Steven AYALA, Petitioner,

v.

Hubert SPECKARD, Superintendent of Groveland Correctional Facility, Respondent.

No. 94 Civ. 7850 (JFK).

United States District Court, S.D. New York

June 21, 1995.

Steven Ayala, Groveland Correctional Facility Sonyea, NY, petitioner pro se (E. Joshua Rosenkranz, Office of the Appellate Defender, New York City, of counsel).

Robert T. Johnson, Dist. Atty., Bronx County, Bronx, NY, for respondent (Joseph N. Ferdenzi and Howard B. Sterinbach, Asst. Dist. Attys., of counsel).

OPINION AND ORDER

JOHN F. KEENAN, United States District Judge:

Petitioner Steven Ayala seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, the Court denies Petitioner's application.

Background

On September 22, 1990, Petitioner Steven Ayala was arrested and charged with selling crack cocaine to an undercover police officer during a "buy and bust operation." Petitioner was tried before a jury in Supreme Court, Bronx County. At trial, the prosecutor made an application to ban spectators from the courtroom while the undercover officer (Detective Dotson) testified against Petitioner. In response to the prosecutor's application, the trial court conducted a hearing to determine whether protecting Detective Dotson's anonymity justified closure.

At the hearing, Detective Dotson testified that he was still engaged in undercover operations in the immediate vicinity of Petitioner's arrest and feared for his safety should his identity become known. Based on the Detective's testimony, the trial court decided to close the courtroom to the public while the Detective testified. Petitioner objected to the court's decision to seal the courtroom, but failed to raise any alternatives to closure or make a special request that family members not be excluded.

On August 20, 1991, Petitioner was convicted of Criminal Sale of a Controlled Substance in the Third Degree (New York Penal Law § 220.39[1]), Criminal Possession of a Controlled Substance in the Third Degree (New York Penal Law § 220.16[1]), and Criminal Possession of a Controlled Substance in the Fifth Degree (New York Penal Law § 220.06[5]). Petitioner was simultaneously sentenced, as a second felony offender, to an indeterminate term of six and one-half to thirteen years imprisonment.

On appeal to the Appellate Division (First Department), Petitioner alleged, inter alia, that the trial court had deprived him of his right to a public trial by temporarily closing the courtroom. The Appellate Division affirmed Petitioner's conviction on March 10, 1994. People v. Ayala, 202 A.D.2d 262, 608

N.Y.S.2d 642 (1st Dept.1994). On May 5, 1994, the New York State Court of Appeals denied Petitioner's application for leave to appeal. People v. Ayala, 83 N.Y.2d 908, 614 N.Y.S.2d 390 (1994). On October 24, 1994, Petitioner's sister filed an affidavit claiming that a court officer did not allow her to enter the courtroom while the undercover officer testified. Petitioner now repeats his assertion that the trial court violated his Sixth Amendment right to a public trial, as applied to the states through the Fourteenth Amendment.

Discussion

I. Exhaustion of All State Remedies

This habeas petition raises one claim: Whether the trial court improperly denied Petitioner of his constitutional right to a public trial. It is well settled that a state prisoner seeking federal habeas corpus review of his conviction must first exhaust his available state remedies. See 28 U.S.C. § 2254(b)(c); Rose v. Lundy, 455 U.S. 509 (1982). Petitioner has fully exhausted his remedies in state court. At trial, Petitioner objected to the court's decision to seal the courtroom. On direct appeal in the Appellate Division, Petitioner claimed that closing the courtroom for Officer Dotson's testimony violated his Sixth Amendment right to a public trial. After the Appellate Division rejected this claim, Petitioner sought discretionary review of the same issue in the New York Court of Appeals, which denied leave to appeal.

The Second Circuit has held that a federal habeas corpus petitioner must have put the state appellate court "on notice" that a federal constitutional claim is at issue. See Grady v. LeFevre, 846 F.2d 862, 864 (2d Cir.1988); Petrucelli v. Coombe, 735 F.2d 684, 688-89 (2d Cir.1984). According to the Second

Circuit, adequate notice to the state appellate court may occur in at least four ways:

> (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

Grady, 846 F.2d at 864 (quoting Daye v. Attorney General, 696 F.2d 186, 194 (2d Cir.1982) (en banc), cert. denied, 464 U.S. 1048 (1984)).

Petitioner's general assertion that he was denied a public trial adequately notified the state appellate courts that a constitutional claim was at issue. More specifically, Petitioner's briefs to the appellate courts cited Waller v. Georgia, 467 U.S. 39, 46 (1984), the seminal Supreme Court case on the right to a public trial, and quoted all four prongs of the test set forth in that case. The state appellate courts were certainly aware of Petitioner's contention that his right to a public trial had been violated. Petitioner's remedies in state court are therefore exhausted.

Petitioner's application is also not barred from habeas review by any procedural default. The last court to render a judgment in this case, the Appellate Division, affirmed Petitioner's conviction without invoking any state procedural rule. In sum, Petitioner's claim is exhausted in state court and no procedural default bars habeas review. This Court may therefore address the merits of Petitioner's claim.

II. The Right to a Public Trial

Petitioner alleges that the trial court violated his right to a public trial by sealing the courtroom during an undercover officer's incriminating testimony. Petitioner's allegation lacks merit. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to a ... public trial." Public trials promote fairness to the defendant, protect against prosecutorial and judicial misconduct, and discourage perjury. Waller, 467 U.S. at 46. But the right to a public trial is not absolute. Id.; Appeal of the Herald, 734 F.2d 93, 100 (2d Cir. 1984).

The Supreme Court has held that in certain instances the right to an open trial may give way to other interests. However, the Court added that such instances will be rare and the balance of interests must be struck with special care. Waller, 467 U.S. at 45. Under Waller, a court may close a criminal trial over the defendant's objection only if the following prerequisites are satisfied: (1) the party seeking closure must advance an overriding interest that is likely to be prejudiced if the trial remains open, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the trial court must make findings adequate to support the closure. Waller, 467 U.S. at 48. Petitioner need not show prejudice. Id., 467 U.S. at 49-50.

A. The Overriding Interest

Criminal trials are presumptively open. To justify closure, a party must demonstrate "an overriding interest that is likely to be prejudiced" if the trial were conducted in public. Waller, 467 U.S. at 48. It is well established that, in some instances, the safety of a witness rises to the level of an overriding interest.

Woods v. Kuhlmann, 977 F.2d 74, 77 (2d Cir.1992); Application of the Herald, 734 F.2d 93 (2d Cir.1984) (danger to persons and ongoing undercover investigations are appropriate reasons to request courtroom closure). This Court agrees with the state courts that protecting the anonymity of Detective Dotson constituted an overriding interest justifying the temporary ban on spectators from the proceedings.

Courts must evaluate the facts of each case individually and make determinations regarding closure on a case-by-case basis. Jones v. Henderson, 683 F.Supp 917, 923 (E.D.N.Y.1988) (closure unwarranted where the government offered no specific evidence showing a compelling interest under the particular circumstances of the case). In the case at bar, the trial court stated that it would not be willing to seal the courtroom unless the specific circumstances of the case warranted closure. The trial court's decision to close the courtroom was based on the individual facts of this case and the particularized testimony of Detective Dotson. The Detective stated that he was still working undercover; that he "definitely" expected to return to the specific area of Petitioner's arrest to buy drugs; and that he feared for his life and safety should he be recognized. Based on the Detective's understandable fear, temporarily excluding the public from the courtroom was a reasonable exercise of the trial court's discretion. Therefore, the first requirement has been satisfied.

B. No Broader Than Necessary

On October 24, 1994, more than three years after Petitioner's trial, his sister filed an affidavit stating that a court officer denied her access to the courtroom during the undercover officer's testimony. The Supreme Court has noted a special concern for assuring defendants the right to have their family members attend trial. See In re Oliver, 333 U.S. 257, 271-72 &

n. 29 (1948). In accordance with that concern, the Second Circuit has held that excluding a defendant's parents from the courtroom during an undercover officer's testimony is unjustified if the parents are not inclined to harm the officer or encounter him during undercover operations. Vidal v. Williams, 31 F.3d 67, 69 (2d Cir.1994).

The holding in Vidal reflects the belief that excluding a defendant's parents often is broader than necessary to protect the state's interest in assuring an officer's safety. But it is easy to distinguish Vidal from the present case. In Vidal, the defendant specifically requested that his parents be allowed to remain in the courtroom. Petitioner here did not make such a request. Moreover, Petitioner's sister, unlike the defendant's parents in Vidal, was not in the courtroom when the court ordered the proceedings closed.

With the aid of hindsight, Petitioner now asserts that the trial court should have asked him whether he wanted any of his family members to be exempt from closure. This Court is unwilling to place the burden of inquiry on the trial court, especially because Petitioner's sister was not in attendance when the court sealed the courtroom. Moreover, Petitioner did not notify the trial court that he wanted his sister to be present. In addition, there is no evidence that Petitioner's sister notified the court officer that she was the Petitioner's sister at the time she was denied access to the courtroom. Therefore, the temporary ban on spectators was no broader than appeared necessary to protect the state's interest in the undercover officer's safety and the second requirement has been met.

C. Reasonable Alternatives

Under the third prong of the Waller test, a "trial court must consider reasonable alternatives to closing the proceeding." Waller, 467 U.S. at 48. After Waller it remains unclear whether

the trial court or the party objecting to closure has the burden of raising alternatives. In dicta, the Second Circuit Court of Appeals has observed that before a trial court seals a courtroom, it should consider less restrictive alternatives such as screening devices to conceal the witness's identity. Vidal, 31 F.3d at 69. The Court's observation in Vidal suggests that trial judges should take the initiative in considering reasonable alternatives to closure.

Despite the suggestion made by the Vidal court, this Court will not impose a burden on courts to sua sponte invent alternatives, especially where there is no evidence that any alternatives existed. At trial, Petitioner had an opportunity to suggest reasonable alternatives but offered none. In fact, Petitioner has still never proposed any reasonable alternative to temporarily closing the proceedings. The Court therefore concludes that the third requirement has also been satisfied.

D. Adequate Findings

The final requirement of the Waller test is that a trial court must make findings adequate to support closure. The purpose of this requirement is to allow a reviewing court to determine whether the closure order was properly entered. Waller, 467 U.S. at 45; Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510 (1984). This Court holds that the trial court satisfied the adequate findings requirement. The trial court placed adequate findings on the record to support the temporary closure of Petitioner's trial. Specifically, the Court notes that the trial court considered Detective Dotson's testimony that he was still working undercover in the area of the Petitioner's arrest and that he feared for his life and safety should he be recognized. Accordingly, the trial court's order to temporarily seal the courtroom was properly entered and thus did not violate Petitioner's Sixth Amendment right to a public trial.

Conclusion

For the reasons set forth above, the Court denies Petitioner's application for a writ of habeas corpus. The Court directs the Clerk of the Court to close this case and remove it from the active docket of the Court.

SO ORDERED.

APPENDIX D

APPENDIX D

Order of the Supreme Court of the State of New York, Appellate Division, First Department

Published at 202 A.D.2d 262, 608 N.Y.S.2d 642 (1st Dept. 1994)

The PEOPLE of the State of New York, Respondent,
v.
Steven AYALA, Defendant-Appellant.
Supreme Court, Appellate Division,
First Department.
March 10, 1994.

Before ROSENBERGER, J.P., and ROSS, ASCH, RUBIN and TOM, JJ.

MEMORANDUM DECISION.

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered August 20, 1991, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and fifth degrees and sentencing him, as a second felony offender, to a maximum term of 6 1/2 to 13 years, unanimously affirmed.

Because the testimony of the arresting officer was credited by the hearing court and there were no "substantial questions concerning the legality of the police conduct in making the arrest", probable cause for defendant's arrest was established and there was no need for the undercover officer to testify or to be made available to defendant (*People v. Petralia*, 62 N.Y.2d 47,

53, 476 N.Y.S.2d 56, 464 N.E.2d 424, *cert. denied*, 469 U.S. 852, 105 S.Ct. 174, 83 L.Ed.2d 109).

The People provided ample justification for the closure of the courtroom during the undercover officer's testimony. The undercover officer testified that he had been working in the specific area where the crime took place for the past month; that he expected to go back there within a day after his trial testimony; that he had purchased drugs in the same building where this crime occurred just one week earlier; that he purchased drugs from the immediate area of this building about 20 times in the past year; that he "[d]efinitely" expected to go back to that area to buy drugs; that he had previously been approached by ex-defendants on the street who had attempted to warn others that he was a police officer; and that he feared for his life and safety as well as the lives and safety of his fellow officers should he be recognized. The trial court clearly did not abuse its discretion in concluding that, in these circumstances, testifying in an open courtroom might endanger the undercover officer's safety (*People v. Martinez*, 82 N.Y.2d 436, 604 N.Y.S.2d 932, 624 N.E.2d 1027).

We have considered defendant's remaining claim and find it to be without merit. Concur--Rosenberger, J.P., Ross, Asch, Rubin and Tom, JJ.

APPENDIX E

APPENDIX E

Denial of Leave to Appeal to the New York Court of Appeals

Published at 83 N.Y.2d 908, 614 N.Y.S.2d 390, 637 N.E.2d 281 (1994)

State of New York
Court of Appeals
Before: Honorable Vito J. Titone, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

STEVEN AYALA,
Defendant-Appellant.

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,[1] there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
May 5, 1994

Vito J. Titone
Associate Judge

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[1] Description of Order:

Order of the Appellate Division, First Department, entered March 10, 1994, affirming a judgment of Supreme Court, Bronx County, rendered August 20, 1991.

APPENDIX F

APPENDIX F

Transcribed Minutes of Hearing to Close the Courtroom During Undercover Officer's Testimony

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: CRIMINAL TERM: PART 48

THE PEOPLE OF THE STATE OF NEW YORK

-against-

STEVEN AYALA,

Defendant.

INDICTMENT #7667/90

---

851 Grand Concourse
Bronx, New York
July 15, 1991

BEFORE:
HONORABLE MARTIN MARCUS,
Justice.

APPEARANCES:
ROBERT T. JOHNSON, ESQ.,
DISTRICT ATTORNEY, BRONX COUNTY
For the People
BY: LISA DREZNICK, ESQ.,
Assistant District Attorney

MICHAEL BERARDINO, ESQ.,
Attorney for the Defendant.

Michele Henley
Senior Court Reporter

* * *

PROCEEDINGS

DETECTIVE WILLIE M. DOTSON, called as a witness by and on behalf of the People, having been duly sworn, testified as follows:

THE COURT: Is your first name William or Willie?

THE WITNESS: Willie, Sir.

THE COURT: Okay. Thank you. You may proceed.

DIRECT EXAMINATION BY MS. DRESNICK:

Q. Detective Dotson, are you currently assigned to the Bronx TNT? A. Yes, Ma'am.

Q. And within what precinct are you currently working? A. The 41 Precinct.

Q. And the location of 1006 Intervale, within what location is that? A. Excuse me?

Q. Where this incident took place, what precinct is that located in? A. In the 41st.

Q. Detective Dotson, how long have you been working within the 41st Precinct, within the precinct, months? A. About a month already.

Q. Are you going to be working there after you testify here today or tomorrow, are you going to be going back to the 41 Precinct? A. Yes, Ma'am.

Q. And do you have any idea about how long you're going to be in that area? A. Maybe six months, it depends.

Q. Okay. And, Detective Dotson, could you please tell the Court what, if any, apprehensions you have about going to that area should you be recognized by people in an open courtroom?

A. Yes. I--if I go back to this particular area and I know I will be because I was there previously and I am recognized, I fear for my life and my safety and that of my fellow police officers due to the fact that if I am recognized.

There have been occasions where I would just say that people are injured or killed if they're recognized and if they know that you are a police officer, it has happened on occasion.

Q. Detective Dotson, have you ever personally been approached by citizens of Bronx County or ex-defendants on the street who have attempted in some way to indicate to other people that you are a police officer? A. Yes.

MS. DRESNICK: Just one moment, Your Honor. (brief pause.)

Q. Just so that we're clear at this point. You are an undercover police officer, you are not in a field team investigator role, are you? A. That's correct.

THE COURT: And expect to be in the future--

THE WITNESS: Oh, definitely--

MR. BERARDINO: I didn't hear your question, Your Honor. I'm sorry.

THE COURT: And expect to be in the future?

THE WITNESS: Yes.

CROSS EXAMINATION BY MR. BERARDINO:

Q. Good afternoon, Detective. A. Good afternoon, Sir.

Q. Detective, do you have an ongoing investigations pending in Bronx County at all with respect to buys, particular buys and particular locations that you are going to make in the future?

MS. DRESNICK: Objection.

THE COURT: Yes or no?

THE WITNESS: Yes.

Q. Are there more than one, more than a dozen? I'm not asking you to describe them, just how many, how many long term investigations are you involved in? A. Long term?

Q. Yes. A. In this precinct?

Q. In this Borough. A. Are you saying in the precinct or in this Borough?

THE COURT: In the Borough.

Q. First in the Borough, in Bronx County, how many long term investigations are you participating in? A. I believe one.

Q. One. And in the 41st Precinct, how many long term investigations are you participating in? A. None.

Q. Would that, would that necessarily mean that you deal almost exclusively with short term investigations? A. I would say so, yes, Sir.

Q. And would you classify a short term investigation as a buy and bust operation? A. Yes, I would, Sir.

Q. Therefore, would you conclude that the majority of your activities are buy and bust operations? A. Yes, Sir.

Q. Now, when was the last time that you purchased narcotics at 1006 Intervale Avenue? A. Last Thursday.

Q. Last Thursday. And how many times since September of 1990 have you purchased narcotics at that particular location?

MS. DRESNICK: Objection, Your Honor. This is not a fishing expedition. We're just trying to determine the safety and the hazard to the particular witness offering testimony.

THE COURT: Sustained. Let me ask you this. How many, how many sales have you made or purchases have you made, say, within the last year in the general area of 1006 Intervale Avenue?

THE WITNESS: I can't answer that now, Sir. I don't have the papers available to me.

THE COURT: Well, do you have a ballpark figure?

THE WITNESS: Maybe twenty.

THE COURT: And do you expect to be purchasing drugs in that area again or in the area around 1006 Intervale Avenue?

THE WITNESS: Definitely.

Q. Detective, you testified to a general fear for your safety, is that correct; if someone were to recognize you from the courtroom, is that correct? A. A general fear?

Q. Yes. A. I fear for my safety.

Q. Okay. Was there anything specifically about this case, has anyone ever approached you with respect to this case if you were to testify, if you're going to testify that would cause you to have some sort of apprehension or fear for your safety? A. I'm sorry. Could you repeat that, Sir?

Q. Has anyone ever appraoched you with respect to t[hi]s case on trial right now to give you any fear or to cause you any apprehension in testifying in this case? A. At this point, no, sir.

Q. And isn't it a fact that you testify with respect to closing the courtroom in every particular case that you do? A. Yes, sir.

MR. BERARDINO: I have no further questions.

MS. DRESNICK: Your Honor, the People would rely on the following case law--

THE COURT: Wait, wait. You have no further questions?

MS. DRESNICK: No further questions.

THE COURT: You're excused. You may step down.

MR. BERARDINO: May I ask that he step outside the courtroom or in the back.

THE COURT: Sure. There is no back. You can step out, please.

(Whereupon, the witness exited the courtroom.)

THE COURT: Go ahead.

MS. DRESNICK: Thank you. The People would rely on the following case law to sustain--in order--to support our position, Your Honor.

First, People against Benjamin Santos, New York Law Journal on October 30th, 1989. There the Court stated that they

didn't need any more reason to justify courtroom closure during active engagement in the community as an undercover narcotics agent is in itself compelling reason for excluding the public from the courtroom.

And secondly, Your Honor, People against Remgino, and that Court held that when there is a showing that a witness is justifiable in his fear for his personal safety and it constitutes a sufficiently recognizable interest of the State, and the burden of establishing--

THE COURT: What's the date on that one?

MS. DRESNICK: The date, yes, Your Honor. May 30th, 1989, in the New York Law Journal.

Your Honor, clearly Detective Dotson has shown this Court, he has told you he fears for his safety should this case be opened to the public.

It's not necessary that the people from the 41st could be coming to this courtroom, it could be anyone from Bronx County.

After six months he could be in another--he could be in the 40 or 46 which is very close to here, Your Honor. He's actively engaged in undercover work and he personally fears for his safety, you heard from his own mouth and I would rest on the witness' testimony.

MR. BERARDINO: Your Honor, I'm more concerned with things done as a general practice and not for any specific reason, and I just feel--

THE COURT: I understand that and I'll hear you further but that's--you brought the point out that he makes this application or asks that the application be made every time he testifies and that may be.

MR. BERARDINO: Well, that's--part of my argument is the following, Your Honor.

In making it on every particular case in which he's involved in I feel that there are cases which indicate he has to present

someth[i]ng to justify the fear and not give a general blanket statement that he fears for his safety.

He was not able to tell us of any long term operations other than just one that he's working on in the entire County. He deals strictly with the undercover buy and busts.

Yes, he's been to the location, he will continue to be in the area but it's nothing that--there is nothing that he can point to, in my opinion, that justifies any fear or any particular threat to his safety.

He did mention that people have been hurt before. I know of only one undercover officer ever getting shot in this County and that had nothing to do with a witness being a witness in any particular case and that is at least in the last eight years.

THE COURT: I--

MR. BERARDINO: Whether he's referring to anything else--

THE COURT: I think you're being a little cavalier about the safety of undercover police officers.

The statistics are not what you say they are on the one hand but on the other, while I agree with you about the generalized fear, that's not based in any fact in law.

I would be troubled by the testimony of an officer who simply makes this application in every case regardless of any circumstances which applies specifically to the particular case in question.

In here it's very evident and more evident from your questioning than from Miss Dreznick's that there are factors which are specific to this case and which justify the closure of the courtroom during his testimony.

He made a sale at this exact location last week. He is working in the same precinct. He has made--I don't remember the estimate he gave now--

MS. DREZNICK: Twenty.

THE COURT: Twenty arrests in the area, in the specific area of [th]is location in the last year and expects to be back to this

location in particular and around it in the near future and he's going to be in this precinct for six months, you know.

While it may be that in another case, which is not in the same precinct and which doesn't relate as closely as this one does to that particular location, I would be willing to grant the application.

In this particular situation it seems to me fully justified, so I'm going to grant the application and seal the courtroom for his testimony.

MS. DREZNICK: Thank you.

MR. BERARDINO: Fine. My objection is noted.

* * *

APPENDIX G

Opinion of the New York Court of Appeals in People v. Martinez

Published at 82 N.Y.2d 436, 604 N.Y.S.2d 932, 624 N.E.2d 1027 (1993)

The PEOPLE of the State of New York, Respondent,
v.
Buenaventura MARTINEZ, Appellant.

The PEOPLE of the State of New York, Respondent,
v.
Howard PEARSON, Appellant.
Court of Appeals of New York.
Nov. 23, 1993.

OPINION OF THE COURT

Chief Judge KAYE.

These appeals of two "buy-and-bust" cases present the question whether defendant's right to a public trial was violated when the trial court ordered the courtroom closed during the testimony of the undercover officer who made the buy. We conclude in the first case that defendant's right was violated, but uphold closure in the second.

People v. Martinez

According to the trial testimony, on February 14, 1990, an undercover officer approached defendant at 158th Street and Melrose Avenue in the Bronx, and obtained two "glassines" of

heroin from him in exchange for $20 of prerecorded "buy money." The officer then returned to his vehicle and radioed a description to fellow members of the Bronx Tactical Narcotics Team (TNT), and defendant was thereafter arrested and identified in a "drive-by" by the undercover.

At trial, the prosecutor requested that the courtroom be closed during the undercover officer's testimony, defendant objected, and a closed hearing was held to explore the issue. The sole witness at the hearing was the undercover, whose direct testimony in its entirety was as follows:

> "Q Detective, are you presently an undercover for Bronx TNT?
> "A Yes, I am.
> "Q Are you still actively engaged in cases in the Bronx area?
> "A Yes, I am.
> "Q Do you have any open cases which have still not yet gone to trial?
> "A Yes.
> "Q Do you fear for your safety if the courtroom is not closed in this case?
> "A Yes."

On cross-examination, defense counsel established that the officer's open cases were all "street level buy operations" in which arrests had already been made, and the trial court elicited that the officer's area of operations was "the whole Bronx." Defense counsel argued that a sufficient showing had not been made, but the court rejected that argument and ordered the courtroom closed during the undercover officer's testimony, finding "serious possibility that any pending investigations or the officer's safety would be jeopardized absent closing the courtroom."

After open-court testimony by the arresting officer and entry of a stipulation that the glassines contained one grain of heroin, defendant was convicted of third degree criminal sale of a controlled substance, and sentenced to an indeterminate prison term of 4 1/2 to 9 years. The Appellate Division affirmed, concluding that the undercover's testimony warranted closure.

People v. Pearson

The evidence at trial revealed that on the afternoon of April 6, 1990, defendant was approached by an undercover officer on the corner of Eighth Avenue and 42nd Street in the Times Square area of Manhattan. At the officer's request, defendant supplied two vials of crack, and she paid him with $10 of prerecorded "buy money." The officer then radioed for backup, and defendant and a codefendant were arrested and charged with drug possession and sale.

As in *Martinez*, at defendant's trial the People requested that the courtroom be closed during the undercover officer's testimony, and defendant objected. By agreement of the parties, the only spectator in the courtroom prior to the hearing (a person apparently known to the prosecutor and the Judge) was asked to leave, and the courtroom was closed for the hearing.

The officer, again, was the sole witness at the hearing. She testified that she was an active undercover officer and had been on duty in the area of West 42nd Street and Eighth Avenue approximately 25 times during the previous 30 days; that she was involved in ongoing investigations in that area, and would be returning to work there immediately after testifying; and that if she were to testify in open court her "cover could be blown and [she] could possibly get killed." She further testified that she routinely enters courthouses through back entrances to avoid being "exposed" to potential future defendants who might be milling about the lobby. In opposing closure, defense counsel

urged that the evidence was not sufficiently compelling to overcome defendant's right to a public trial; that the undercover's contemplated "buy-and-busts" were not the sort of ongoing investigation that required closure; and that more substantial proof of actual danger was required.

Noting that there had been only one spectator to that point, and putting aside any concern for jeopardizing ongoing buy-and-busts "because that's not what the witness is talking about," the trial court ruled that the courtroom should be closed because of the officer's continuing active engagement in the area and consequent personal risk. "[S]he has reason to fear retaliation from people who might put two and two together realizing that she has been the person engaging in the undercover purchase of narcotics from those people who do business in that location." In response to defense counsel's argument, the trial court noted that the last time it conducted a *Hinton* hearing it denied the People's motion to close the courtroom, and that closure was by no means automatic.

After the undercover officer testified in a closed courtroom, the remaining testimony (from the backup officer and two chemists) was taken in open court. Defendant was convicted as charged and sentenced to 5 to 10 years' imprisonment. The Appellate Division affirmed.

Analysis

Analysis begins with several well-recognized propositions. The guarantee of a public trial (U.S. Const. 6th Amend.; Civil Rights Law § 12; Judiciary Law § 4) is fundamental, but neither absolute nor inflexible. Trial courts unquestionably have discretionary authority to exclude the public, but must exercise that discretion "sparingly * * * and then, only when unusual circumstances necessitate it." (*People v. Hinton*, 31 N.Y.2d 71, 76, 334 N.Y.S.2d 885, 286 N.E.2d 265, *cert. denied* 410 U.S.

911, 93 S.Ct. 970, 35 L.Ed.2d 273.) As the case law makes plain, both the defendant and society at large have a vital stake in the concept of a public trial (*see, e.g., Hinton*, 31 N.Y.2d, at 73, 334 N.Y.S.2d 885, 286 N.E.2d 265; *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31).

In *Hinton* itself, the courtroom was closed for the testimony of an undercover agent on a representation that the undercover was still operating actively in the community; that other narcotics investigations were pending; and that other targets in these investigations were present in the courtroom, thus jeopardizing the agent's life if his identity were exposed. Where "the very presence of other investigatory targets posed a threat to the agent's life," we concluded that the requisite unusual circumstances had been shown to justify closure (31 N.Y.2d, at 75, 334 N.Y.S.2d 885, 286 N.E.2d 265). Other examples of unusual circumstances mentioned in *Hinton* included the presence of gang members in the courtroom, and threats received by the witness.

In *People v. Jones*, 47 N.Y.2d 409, 418 N.Y.S.2d 359, 391 N.E.2d 1335, *cert. denied* 444 U.S. 946, 100 S.Ct. 307, 62 L.Ed.2d 315, we overturned the trial court's discretionary closure, which had been ordered as a matter of judicial notice that undercover narcotics work in New York City was dangerous. As this Court noted, a trial court's own impressions of the general vicissitudes of undercover narcotics work do not suffice for closure. "There should have been a factual showing that an exception to the norm of a public trial was justified * * * That undercover work at times entails serious threats to the safety of agents was by no means sufficient to connect that threat to this witness." (47 N.Y.2d at 415, 418 N.Y.S.2d 359, 391 N.E.2d 1335.)

Since *Jones*, our admonition that there should be a factual showing to support closure has resulted in "*Hinton* hearings" where--as in the cases before us--the undercover officer may, in

a closed hearing, be examined and cross-examined. Since *Jones*, also, the United States Supreme Court has further particularized the standard for closure under the Sixth Amendment, which we recognized in *People v. Kin Kan*, 78 N.Y.2d 54, 58, 571 N.Y.S.2d 436, 574 N.E.2d 1042 as a four-pronged test:

> "[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure" (*Waller v. Georgia*, 467 U.S. 39, 48, 104 S.Ct. 2210, 2216, *supra*).

In *Kin Kan*, involving gang-related, large-scale drug trafficking, the prospective witness (an accomplice) testified that he was still involved as a confidential informant in an ongoing investigation, that he feared retaliation by defendant's "people" (but not her family), and that he feared retaliation from persons connected with his continuing informant activity and from their friends and did not want to show his face in public. Even then, however, we agreed with the Appellate Division that the trial court had erred in barring defendant's family from the courtroom: "as a matter of law under the governing legal principles * * * the delicate balancing of Kan's individualized right to a public trial against the accomplice witness's expressed fears of retaliation tips in favor of respondent Kan." (78 N.Y.2d, at 58, 571 N.Y.S.2d 436, 574 N.E.2d 1042.) The requisite "delicate balancing" echoes the Supreme Court's caution in *Waller* that, in determining the issue of closure, "the balance of interests must be struck with special care." (467 U.S. at 45, 104 S.Ct. at 2215.)

Applying these precedents to the facts at hand, we conclude that the People's perfunctory showing in *Martinez* was insufficient to meet the standards for closure repeatedly insisted upon by this Court and the Supreme Court. We agree with defendant's observation that, were such a showing accepted, we would in effect sanction a rule of per se closure for undercover officers, for the testimony established no more than the officer's continuing activity as an undercover "in the Bronx area"--more than 41 square miles and 1.2 million residents--and "unparticularized impressions of the vicissitudes of undercover narcotics work in general." (*Jones*, 47 N.Y.2d at 415, 418 N.Y.S.2d 359, 391 N.E.2d 1335.) No reference was made, for example, to associates of defendant or targets of investigation likely to be present in the courtroom, or to threats received. Indeed, no link was made, or even attempted, between the officer's fear for his safety throughout the Bronx area and open-court testimony in this buy-and-bust case.

While the trial court, reading its ruling into the record, acknowledged that special care must be taken before a courtroom is closed to the public, its holding that "pending investigations or the officer's safety would be jeopardized absent closing the courtroom" is supported only by the officer's own assertion that he feared for his safety if the courtroom was not closed.

By contrast, the factual showing supporting closure in *Pearson* more closely approximates the standard reflected in the case law. In her testimony, the undercover officer identified a particular location--Port Authority in Manhattan, the site of defendant's arrest--readily accessible from the Manhattan courthouse, at which she had functioned daily for a month, and to which she would return as an undercover that very day to complete her work with drug dealers. We cannot say that the trial court abused its discretion in concluding that, in these circumstances, testifying in an open courtroom might endanger the undercover officer's safety.

Even assuming *Waller's* first prong was satisfied by evidence that the People established an overriding interest justifying closure, defendant Pearson argues that his conviction should nonetheless be reversed because the trial court made no effort to meet *Waller's* third prong--that the court "consider reasonable alternatives to closing the proceeding." (*Waller*, 467 U.S. at 48, 104 S.Ct. at 2216.) Before this Court, defendant suggests that a court officer might have been stationed at the door to admit at least those persons who posed no threat to the officer's safety, or defendant might have been asked to name family members or others who could have been admitted, or that the undercover might have testified in open court from behind a screen, as in *United States v. Lucas* (932 F.2d 1210, 1216-1217 [8th Cir.], *cert. denied* --- U.S. ----, 112 S.Ct. 399, 116 L.Ed.2d 348).

While it is surely the better practice, and indeed may be the required practice, for a trial court explicitly to consider whether closure is broader than necessary, to explore reasonable alternatives to closure, and to make findings adequate to support closure (*see, Waller*, 467 U.S. at 48, 104 S.Ct. at 2216), on the present record the court's failure to consider the alternatives defendant now suggests was not error. Defendant's sole objection and the entire argument before the trial court was concentrated on the sufficiency of the People's showing for closure. There had been no unidentified spectators in the courtroom from the time the trial started, and defendant made no mention of particular friends or family he wished to have in attendance (*see, by contrast, Kin Kan*, 78 N.Y.2d at 58, 571 N.Y.S.2d 436, 574 N.E.2d 1042). Such measures as stationing a guard at the door, taking names and using a screen might well be investigated in future cases, but on this record the trial court did not err in failing to consider them.

Accordingly, in *Martinez*, the Appellate Division order should be reversed and a new trial ordered, and in *Pearson* the Appellate Division order should be affirmed.

Judges SIMONS, TITONE, HANCOCK, BELLACOSA, SMITH and LEVINE, JJ., concur.

In *People v. Martinez*: On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order reversed and a new trial ordered.

In *People v. Pearson*: Order affirmed.

APPENDIX H

APPENDIX H

Opinion of the United States Court of Appeals for the Second Circuit in Pearson v. James

(Cite as 1997 WL 33521 (2nd Cir. N.Y.))

Howard PEARSON, Petitioner-Appellant,
v.
Charles JAMES, Superintendent of Collins Correctional Facility, Respondent-Appellee.
Nos. 1669, 95-2801.
United States Court of Appeals,
Second Circuit.
Argued June 4, 1996.
Decided January 30, 1997.

Before: NEWMAN, Chief Judge, JACOBS and CABRANES, Circuit Judges.

Appeal from the October 26, 1995, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge) denying his petition for a writ of habeas corpus to challenge his state court conviction because the courtroom was closed during testimony of an undercover police officer without considering alternatives to closure.

Reversed and remanded with directions to issue the writ unless the State retries the defendant within a reasonable time. Judges Jacobs and Cabranes concur with a separate opinion.

Diane E. Courselle, New York, N.Y. (E. Joshua Rosenkranz, Joseph M. Nursey, Office of the Appellate Defender, New York, N.Y., on the brief), for petitioner-appellant.

Louis L. Bono, Asst. Atty. Gen., New York, N.Y. (Dennis C. Vacco, N.Y. State Atty. Gen., Barbara Gott Billet, Darrell M. Joseph, Office of the N.Y. State Atty. Gen., New York, N.Y., on the brief), for respondent-appellee.

JOHN O. NEWMAN, Chief Judge:

In Ayala v. Speckard, 89 F.3d 91 (2d Cir.), modified on denial of rehearing, --- F.3d ---- (2d Cir.1996), this Court ruled that a defendant's constitutional right to a public trial is violated when a trial judge closes a courtroom for a valid reason but fails to consider, on his own motion, alternatives to closure that would adequately protect the state interest justifying the closure. That ruling governs this appeal by Howard Pearson from the October 26, 1995, judgment of the District Court for the Southern District of New York (Peter Leisure, District Judge) denying his petition for a writ of habeas corpus to challenge his state court conviction for selling cocaine to an undercover police officer. The state court trial judge closed the courtroom during the testimony of the officer but did not consider any alternatives to courtroom closure. Ayala requires us to reverse.

Facts

Pearson was arrested after an undercover police officer, conducting a routine "buy and bust" operation, purchased $10 worth of cocaine from him near the corner of 42nd Street and Eighth Avenue in Manhattan. The transaction was one of 200 effected by the officer in the preceding 15 months.

At trial in 1990, the prosecutor moved to have the courtroom closed during the officer's testimony, asserting that her safety and her work as an undercover would be compromised if she testified in open court. With the defendant's agreement, the courtroom was closed for a hearing to determine closure during

the officer's trial testimony. In support of the closure request, the officer testified that she was continuing her undercover work in the neighborhood of her purchase from Pearson, that she feared public exposure and that if her identity was revealed, "my cover could be blown and I could get killed." She also said this was her first time testifying as an undercover officer.

The trial judge acknowledged that there was no concern about jeopardizing "any ongoing investigation ... with respect to a particular target or with a particular conspiracy." However, he continued,

> that doesn't undermine the fact that she is now actively engaged in that geographical area and she will continue to be. It doesn't undermine the fact that from her past 30 days and even before that involvement in that area, she has reason to fear retaliation from people who might put two and two together realizing that she has been the person engaging in the undercover purchase of narcotics from those people who do business in that location.
>
> I am persuaded that the courtroom should be closed.

State court trial tr. at 35. Defense counsel did not suggest any alternatives to closure, and the trial judge did not consider any on his own motion. The courtroom was closed during the officer's testimony, which was the core of the prosecution's case.

Pearson was found guilty by a jury and sentenced to two concurrent terms of five to ten years. His conviction was affirmed on direct review. People v. Pearson, 191 A.D.2d 151, 594 N.Y.S.2d 29 (lst Dep't 1993), aff'd, People v. Martinez, 82 N.Y.2d 436, 604 N.Y.S.2d 932, 624 N.E.2d 1027 (1993).

Magistrate Judge Grubin recommended denial of Pearson's habeas corpus petition. She concluded that the closure was permissible under Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct.

2210, 81 L.Ed.2d 31 (1984), because (1) the prosecution had established an overriding interest--the officer's safety and concealment of her identity, (2) the closure lasted only during the officer's testimony, (3) no alternatives were suggested to the trial judge by defendant's counsel, and (4) the judge's findings were adequate to support the closure. In concluding that the trial judge was not obliged to consider alternatives on his own motion, the Magistrate Judge explicitly relied on Ayala v. Speckard, 1995 U.S. Dist. LEXIS 8558, 1995 WL 373419 (S.D.N.Y. June 21, 1995), a District Court decision subsequently reversed by this Court, 89 F.3d 91. Judge Leisure accepted the recommendation and denied the habeas petition, also relying on the District Court's decision in Ayala to reject defendant's contention that the trial judge was required to consider alternatives on his own motion.

Discussion

We agree with the District Court that three of the four factors outlined in Waller as requirements for courtroom closure were met in this case. First, the prosecution adequately supported an overriding interest in protecting the undercover officer from exposure of her identity. Her testimony that her undercover activity was continuing in the same neighborhood where she purchased cocaine from the defendant sufficed to indicate the State's strong interest in concealing her identity. We need not determine whether her fear of retaliation would have sufficed, though we note that this interest could be asserted by any officer presenting significant evidence against a criminal defendant. Second, we agree that the closure was no more extensive than required to protect the interest asserted. Finally, the State Court Judge's findings adequately supported his ruling.

However, Waller requires that "the trial court must consider reasonable alternatives to closing the proceeding." 467 U.S. at

48. Our decision in Ayala rejected the District Court's view that a trial judge does not have an obligation to consider, sua sponte, alternatives to closure. 89 F.3d at 96-97. That view became the holding of the Court upon consideration of the State's petition for rehearing. See Ayala v. Speckard, --- F.3d ----, ---- (2d Cir.1996). In the pending case, the state court trial judge did not consider alternatives. Some alternatives, such as placing a screen between the undercover officer and the spectators, leaving the jury's view unobstructed, or perhaps disguising her appearance appear to have been worth considering. Of course, these alternatives, and perhaps others, might themselves be disadvantageous to a defendant. Screening might imply to the jury that the defendant has dangerous friends among the spectators, and a disguise might impair the jury's ability to assess the credibility of the undercover officer. Clearly, alternatives creating such risks should not be imposed on a defendant who objects to them. Ayala requires only consideration of alternatives to closure.

Under the authority of Ayala, we conclude that the courtroom closure, without consideration of alternatives, denied the appellant his constitutional right to a public trial. See Okonkwo v. Lacy, --- F.3d ---- (2d Cir.1997). Accordingly, the judgment of the District Court is reversed, and the case remanded with directions to issue the writ, unless the State retries the defendant within a reasonable time.

JACOBS and CABRANES, Circuit Judges, concurring:

We subscribe to the opinion of the Court, and agree in particular that we are required to reverse because of Ayala's holding that a state judge violates the Sixth Amendment by closing the courtroom for the testimony of an undercover agent who is slated to return to the same duties at the same post, unless the court, on its own motion, has considered one or more

lesser alternatives. See Commodity Futures Trading Comm'n v. Dunn, 58 F.3d 50, 53-54 (2d Cir.1995), cert. granted, --- U.S. ----, 116 S.Ct. 1846, 134 L.Ed.2d 947 (1996); United States v. Ianniello, 808 F.2d 184, 190 (2d Cir.1986) ("This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc."), overruled on merits en banc, United States v. Indelicato, 865 F.2d 1370, 1381-82 (2d Cir.1989).

We write separately to record disagreement with the Ayala holding. Ordinarily, adherence to a rule once adopted, perfect or not, serves so many useful objectives that it is pointless to record disagreement with it in a subsequent decision, let alone so soon after the opinion that announces the rule. This appeal, however, is the third occasion in recent days in which we have granted a writ of habeas corpus on the Ayala ground. See Okonkwo v. Lacy, No. 95-2626, 1997 WL 1669 (2d Cir. Jan.3, 1997); Ayala v. Speckard, 102 F.3d 649 (2d Cir.1996). It is also remarkable that the state courts have adopted a contrary principle, People v. Martinez, 82 N.Y.2d 436, 444, 604 N.Y.S.2d 932, 624 N.E.2d 1027 (1993) (Kaye, C.J.), and seem to be perfectly ready to adhere to it, notwithstanding the Ayala decision. See People v. Pepe, --- N.Y.S.2d ----, 1997 WL 7024 (1st Dep't 1997) ("To the extent that Ayala v. Speckard might require a different result, we decline to follow that case." (citations omitted)); see also People v. Lugo, 650 N.Y.S.2d 102, 103 (1st Dep't 1996) (In resolving conflict between Ayala and contrary decision by New York Court of Appeals, the ruling of the New York Court of Appeals should be followed.); People v. Nieves, 648 N.Y.S.2d 583, 585 (1st Dep't 1996). If the judges of the New York State courts, enforcing the United States Constitution by their own lights, decline to apply the Ayala principle, Ayala relief may be available only in federal court. Since Ayala imposes a sua sponte obligation on state judges that state courts may not recognize or enforce, ordinary principles of

waiver (by failure to object and failure to address on direct appeal) may lose some force, and resort to habeas corpus to enforce the Ayala principle may become commonplace.

We respectfully disagree with the holding in Ayala that the kind of closure effected here is unconstitutional unless the trial judge gives sua sponte consideration to alternatives. In Ayala, the supposed basis of that principle is given as Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), but Waller itself says nothing about sua sponte consideration of alternatives. Justice Powell, the author of Waller, earlier suggested that those who object to closure bear the burden of suggesting alternative measures. Gannett Co. v. DePasquale, 443 U.S. 368, 401, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Powell, J., concurring). The Third Circuit agrees. United States v. Raffoul, 826 F.2d 218, 225 (3d Cir.1987). But see Ayala, 102 F.3d at 653 n. 3 (acknowledging Justice Powell's view, but noting that "[i]t could well be that Justice Powell altered his view in the interim").

The Ayala opinion also leans heavily on Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), pointing out that the Supreme Court reversed a court-room closure--in part for failure to consider alternatives--where there had been closure pursuant to an unopposed motion. Ayala, 102 F.3d at 653. But that case involved the First Amendment right of access to criminal proceedings. The consideration of alternatives sua sponte is more readily viewed as a necessary

precaution in the First Amendment context, where often the parties asserting the constitutional right (usually the press and public) are not direct parties to the case.[1]

The Ayala principle seems to be singularly unproductive in terms of any incremental benefit to a defendant or to the values of an open and fair trial. Ayala suggests that there are "numerous obvious alternatives" to closure of the courtroom during testimony by the undercover agent, and describes several examples. 102 F.3d at 653 (emphasis added). Yet it is evident that the trial court was not required sua sponte to think of all of those particular alternatives; the constitutional error identified in Ayala is giving "zero consideration". Id. But this rule raises a number of practical questions and objections. Is it enough to properly consider and reject one or more alternatives as unfeasible if some feasible alternative can be identified afterward on a petition for habeas corpus? What incentive is there for any defendant to identify alternatives to closure? How will anyone know if alternatives were considered if (as may be the case) the state courts recognize no need to give such consideration, either under state law or the federal Constitution? Specifically, in this case, how do we know that the trial court did not take the step

---

[1] There is also a question as to whether closure for the testimony of a single witness is a drastic measure that, under Waller, requires consideration of alternatives at all. In Waller the trial court closed the entire proceeding (a suppression hearing). Waller in turn relies on Press-Enterprise, in which the virtual whole of a six-week voir dire was closed.

Even if every clearing of a courtroom is deemed to be a measure that requires consideration of alternatives, the trial judge here--and in Ayala and in Okonkwo--may (for all anyone knows) have judged the one-witness closure to be the least exclusionary alternative that the court could think of unaided by any better suggestion from the parties. The judge did not cast his ruling in these terms; but why should we expect to see that? State law does not require such a statement; and neither did we, until recent days.

that it took because it was a lesser measure than closure of the entire trial?

The three alternatives to closure listed in Ayala seem to us more problematical--and prejudicial to the defendant--than what was done. (i) Placing a screen in front of a witness would cloak the undercover agent with glamour; and may suggest to the jury that the defendant and the defendant's friends and family are dangerous. (ii) That risk is only partially alleviated by asking the defendant whom he wants to remain in the courtroom (a step that may not have occurred to the trial judge here because the gallery was apparently nearly empty); we assume that a defendant has a great incentive under Ayala to be inclusive, and to insist that all the world witness what he regards as his unjust ordeal. (iii) Finally, use of a "disguise"--as the opinion in this case notes--could easily impair the jury's opportunity to observe the witness and the defense's opportunity to display the witness's reactions on cross-examination (not to mention the issue of what would be an appropriate costume).

One irony of the Ayala rule is that this defendant's habeas petition would be a whole lot stronger if the trial judge had rejected the closing of the courtroom, and ordered that the undercover agent testify in disguise notwithstanding the defendant's objection. The opinion in this case properly notes that the alternatives to closure may themselves be disadvantageous to a defendant. Thus, the effect of all this is that we are compelled by our newly-minted precedent in Ayala to grant a writ of habeas corpus by reason of the trial court's failure to make a record of considering unspecified alternatives to a step that in itself seems perfectly sensible--alternatives that need not be adopted and that (if adopted) might justify reversal or habeas relief on other grounds.

EDITOR'S NOTE

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No. 96-1412

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

HUBERT SPECKARD, Superintendent,
Groveland Correctional Facility,

Petitioner,

v.

STEVEN AYALA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 8, 1997

36 pp

No. 96-1412

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STEVEN AYALA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Steven Ayala, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari and to proceed in forma pauperis. Respondent has been granted leave to so proceed in all state court proceedings in this matter, in the United States District Court for the Southern District of New York, and in the United States Court of Appeals for the Second Circuit. Respondent's affidavit in support of this motion is attached hereto.

RICHARD M. GREENBERG, ESQ.

Affidavit

State of New York)
) ss.
County of New York)

I, Steven Ayala, being first duly sworn on oath, do depose and say as follows:

1. I am the Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty that I am unable to pay the costs of said case or to give security therefor; and I believe I am entitled to relief.

2. I am not currently employed, nor have I had permanent employment since I was incarcerated by the State of New York. My last employment was September 29, 1996. At that time, I received $200 per week, before taxes.

3. Within the last twelve months I have not received any money from any business or profession or self-employment, nor do I receive any interest, dividends, pensions, annuities, life insurance, gifts, inheritances, or other like source of income. I receive state unemployment compensation in the amount of $163 per week.

4. I have no checking or savings account. I possess minimal cash -- less than $20.

5. I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

6. I have one dependent, my five-month old son. I contribute $50 per week for his support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Steven Ayala

Steven Ayala

SUBSCRIBED AND SWORN TO before me this 7th day of January 1997.

Richard M. Greenberg
Notary Public

My Commission expires:

RICHARD M. GREENBERG
Notary Public, State of New York
No. 31-4670365
Qualified in New York County
Commission Expires August 31, 1998

No. 96-1412

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

HUBERT SPECKARD, Superintendent,
Groveland Correctional Facility,

Petitioner,

v.

STEVEN AYALA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD M. GREENBERG*
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KARL E. PFLANZ

QUESTION PRESENTED

Whether the state's petition for a writ of certiorari should be denied where the United States Court of Appeals for the Second Circuit properly applied long-standing principles concerning an accused's right to a public trial and where the purported conflict between the Second Circuit and a prior decision of the New York Court of Appeals is likely to be resolved in cases currently pending before the New York Court of Appeals?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
The Trial	2
The State Court Appeal	5
The Ruling on Habeas Corpus	5
The Decisions of the Court of Appeals	5
REASONS WHY THE PETITION SHOULD BE DENIED	8
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED LONG-STANDING PRINCIPLES CONCERNING AN ACCUSED'S RIGHT TO A PUBLIC TRIAL AND THE PURPORTED CONFLICT BETWEEN THE SECOND CIRCUIT AND A PRIOR DECISION OF THE NEW YORK COURT OF APPEALS IS LIKELY TO BE RESOLVED IN CASES CURRENTLY PENDING BEFORE THE NEW YORK COURT OF APPEALS.	8
CONCLUSION	15
RESPONDENT'S APPENDIX	
Appendix A (Relevant portions of trial transcript)	16
Appendix B (Statement Pursuant to NYCA Rule 500.2 submitted by appellant in People v. Robert Ayala)	22
Appendix C (Order Granting Leave to Appeal to appellant in People v. Robert Ayala)	24
Appendix D (Statement Pursuant to NYCA Rule 500.2 submitted by appellant in People v. Nieves)	25
Appendix E (Order Granting Leave to Appeal to appellant in People v. Nieves)	27

TABLE OF AUTHORITIES

Cases

Ayala v. Speckard, 102 F.3d 649 (2d Cir. 1996) 6, 13

Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996) 6, 13

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 11

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) . 8

Okonkwo v. Lacy, 104 F.3d 21 (2d Cir. 1997) 6

People v. Robert Ayala, ___ A.D.2d ___, 649 N.Y.S.2d 131 (1st Dept. 1996), appeal granted, ___ N.Y.2d ___, ___ N.Y.S.2d ___ (Jan. 9, 1997) 9, 10

People v. Nieves, ___ A.D.2d ___, 648 N.Y.S.2d 583 (1st Dept. 1996), appeal granted, ___ N.Y.2d ___, ___ N.Y.S.2d ___ (Feb. 4, 1997) 10

People v. Pearson, 82 N.Y.2d 436, 602 N.Y.S.2d 932 (1993) 9, 10

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) 8, 12, 13, 14

Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 8, 12, 14

United States v. Raffoul, 826 F.2d 218 (3d Cir. 1987) . 11, 12

Waller v. Georgia, 467 U.S. 39 (1984) . . . . . passim

United States Constitution

U.S. Const. amend. VI . . . . . passim

U.S. Const. amend. XIV . . . . . passim

Statutes

N.Y. Penal Law § 220.06(5) 5

N.Y. Penal Law § 220.16(1) 5

N.Y. Penal Law § 220.39(1) 5

Other Authority

Stern, Gressman, et. al., Supreme Court Practice
(7th ed. 1993) 11

No. 96-1412

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

HUBERT SPECKARD, Superintendent,
Groveland Correctional Facility,

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v.

STEVEN AYALA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Steven Ayala respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit's opinions in this case. Those opinions are reported at 89 F.3d 91 and 102 F.3d 649 (1996).

STATEMENT OF THE CASE

The Trial

On September 2, 1990, Steven Ayala allegedly sold ten dollars worth of cocaine to an undercover police officer, Willie Dotson. Dotson was involved in a "buy-and-bust operation," a one-time attempt to buy a single dose of drugs from a person who looks like he might be selling. Under this operation, if the undercover officer successfully makes a buy, he radios a description of the suspect to a nearby backup officer, who then approaches and, within minutes, makes an arrest. R.A. 17-18.[1] A buy-and-bust operation does not include any long-term investigation of any person or persons suspected of selling drugs. R.A. 17. Dotson -- whose real name was used freely by the prosecutor throughout Mr. Ayala's trial, including those portions that were conducted publicly, see, e.g. R.A. 20 -- had been involved in approximately two hundred buy-and-bust operations, just like this one, in only two years of undercover work. R.A. 18.

At Mr. Ayala's trial, conducted some ten months after his arrest, Dotson was the only person to identify Mr. Ayala as having sold drugs and was the state's key witness. Indeed, the prosecution's only other witness was the arresting officer from

---

[1]References to the State's Petition for Certiorari, the State's Appendix, and the Respondent's Appendix will be cited as "P.", "P.A.," and "R.A.," respectively.

the backup team. During the trial, the prosecution moved to have all spectators excluded from the courtroom during Dotson's testimony. P.A. 57-64. The state's request was based solely on the fact that Dotson was an active undercover officer, which, in the prosecutor's opinion, was "itself compelling reason for excluding the public from the courtroom," so that the court "didn't need any more reason to justify courtroom closure." P.A. 62.

The trial court conducted a brief hearing in which Dotson testified in support of the state's closure request. On the prosecutor's direct examination, which fills less than three transcript pages, Dotson testified that he had been working in the precinct where Mr. Ayala was arrested for approximately one month, and that he expected to continue working there for "[m]aybe six months, it depends." P.A. 58. Dotson also stated that he had previously been "approached" by people "who have attempted in some way to indicate to other people that [he was] a police officer," P.A. 59, and that there had been occasions where other undercover officers had been harmed when their identities were revealed. P.A. 59. Dotson did not suggest, however, that any such occurrence had resulted from his, or any officer's, having testified in open court. While Dotson asserted that he would fear for his life if he were recognized as a police officer, he did not link any such fear to testifying openly at Mr. Ayala's trial.

On cross-examination, Dotson testified that he was involved in only one long-term investigation in all of Bronx County, none in his own precinct. P.A. 60. He participated "almost exclusively" in short-term buy-and-busts. P.A. 60. During the week before trial, Dotson had made one undercover purchase at the location where Mr. Ayala was arrested. P.A. 60. The court asked Dotson how many purchases he had made in the last year in the general area of Mr. Ayala's arrest. Dotson estimated "[m]aybe twenty." P.A. 60. Dotson expected to return to that general area to make purchases in the future. P.A. 61.

Dotson readily admitted that he routinely sought to have the courtroom closed for his testimony in <u>every</u> case in which he was involved. P.A. 61. Dotson acknowledged that there was nothing about Mr. Ayala's case in particular that caused him any fear or apprehension about testifying. P.A. 61.

Over Mr. Ayala's objection, the trial court ordered that all spectators be excluded from the courtroom during Dotson's testimony. P.A. 63-64. The court based its ruling on the testimony that Dotson was working in the same precinct and expected to return to the same area in the future. P.A. 63-64. At no point in the record did the trial court consider alternatives to closing the courtroom nor did the court consider whether a narrower remedy than total closure would suffice. Thus, all spectators were precluded from attending the most critical portion of the trial.

On August 20, 1991, Mr. Ayala was convicted of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, and criminal possession of a controlled substance in the fifth degree, see N.Y. Penal Law §§ 220.39(1), 220.16(1) & 220.06(5), and sentenced to six and one-half to thirteen years of imprisonment.

The State Court Appeal

On March 10, 1994, the Supreme Court of the State of New York, Appellate Division, First Department, affirmed Mr. Ayala's conviction. P.A. 54-55. On May 5, 1994, leave to appeal to the New York State Court of Appeals was denied. P.A. 56.

The Ruling on Habeas Corpus

On June 21, 1995, the United States District Court for the Southern District of New York denied Mr. Ayala's petition for a writ of habeas corpus. P.A. 45-53.

The Decisions of the Court of Appeals

On July 15, 1996, the Second Circuit applied the test set forth in Waller v. Georgia, 467 U.S. 39 (1984), and reversed and remanded with instructions to grant the writ: The prosecution failed to carry its burden to establish that an overriding state interest would have been prejudiced by Dotson's testimony in open court, and the trial court failed to consider reasonable

alternatives to complete closure of the courtroom during Dotson's testimony. Ayala v. Speckard, 89 F.3d 91, 95-96 (2d Cir. 1996) ("Ayala I").

The state filed a petition for rehearing with a suggestion for rehearing en banc. On December 11, 1996, the court granted the state's petition for rehearing and in a panel decision reaffirmed its original decision. Ayala v. Speckard, 102 F.3d 649, 650 (2d Cir. 1996) ("Ayala II") ("[W]e remain convinced that our initial opinion was correctly decided."). Contrary to the state's characterization in its petition for certiorari, see P. 9, the court expressly adhered to its earlier holding that the prosecution failed to establish that Dotson's safety would have been prejudiced by his testifying in open court. Ayala II, 102 F.3d at 652; see Okonkwo v. Lacy, 104 F.3d 21, 25 (2d Cir. 1997) (relying upon Ayala I's holding regarding first prong of Waller test).

In addition, the court amplified its discussion of the third Waller prong, holding that the trial court's failure to consider alternatives to complete closure deprived Mr. Ayala of his public trial right. The court initially observed that Waller itself suggests that the trial court must consider reasonable alternatives, even in the absence of a specific request. Ayala II, 102 F.3d at 653. Next, the court recognized that the Sixth Amendment is at least as protective of the right to a public trial as the First Amendment, see Waller, 467 U.S. at 46, and that under the First Amendment trial courts must always consider

less restrictive alternatives to complete closure. 102 F.3d at 653. Third, the court found the requirement to consider less restrictive alternatives implicit in Waller's directive that a courtroom closure be no broader than necessary. Id. Fourth, the court noted the existence of less restrictive alternatives. Id. at 653-54. Finally, the court, acknowledging that courtrooms are presumed to be open, see Waller, 467 U.S. at 45, concluded that if the party advocating full closure does not suggest reasonable alternatives, then the trial court itself should do so. 102 F.3d at 654.

The Second Circuit declined the state's sugg stion for rehearing en banc. On March 3, 1997, the state filed its petition for certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED LONG-STANDING PRINCIPLES CONCERNING AN ACCUSED'S RIGHT TO A PUBLIC TRIAL AND THE PURPORTED CONFLICT BETWEEN THE SECOND CIRCUIT AND A PRIOR DECISION OF THE NEW YORK COURT OF APPEALS IS LIKELY TO BE RESOLVED IN CASES CURRENTLY PENDING BEFORE THE NEW YORK COURT OF APPEALS.

This Court has emphasized that a defendant's right to a public trial requires courtrooms to be presumptively open, and that closure should be a rare and extreme event. Waller v. Georgia, 467 U.S. 39, 45 (1984); see Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) ("the State's justification in denying access must be a weighty one"). The Sixth Amendment guarantee to a public trial is at least as strong as the First Amendment guarantee. Waller, 467 U.S. at 46 ("[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and the public."). Accordingly, this Court has applied the same standards for public trial claims under the Sixth Amendment as it has for claims under the First Amendment. Id. at 47-48 (adopting standards of Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise I")). See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7, 14-15 (1986) ("Press-Enterprise II").

Applying these longstanding principles and the specific guidelines set forth in Waller, the Second Circuit held that, in this unremarkable ten-dollar street-level alleged drug sale, the prosecution failed to carry its heavy burden to justify closure

of the courtroom during Dotson's testimony. The court first held that Dotson's testimony failed to establish that a compelling interest was likely to be prejudiced by his testifying openly at Mr. Ayala's trial. The court also held that the trial court's failure to consider reasonable alternatives to the complete exclusion of the public during Dotson's crucial testimony deprived Mr. Ayala of his right to a public trial.

Notwithstanding the Second Circuit's straightforward application of bedrock constitutional law, the state premises its petition for certiorari on a purported conflict between the Second Circuit and the New York Court of Appeals' decision in People v. Pearson, 82 N.Y.2d 436, 443-44, 602 N.Y.S.2d 932, 936 (1993),[2] as to whether a trial court must always consider reasonable alternatives before ordering full closure of the courtroom in a criminal case. See P. 11-17. The state's petition falters, however, on what it does not say. Prior to the state's filing its petition, the New York Court of Appeals granted leave to appeal in two separate cases specifically to reconsider its Pearson decision in view of the Second Circuit's decisions in this case.

On January 9, 1997 -- almost two months prior to the state's filing its petition for certiorari -- Judge George Bundy Smith granted leave to appeal in People v. Robert Ayala, ___ A.D.2d ___, 649 N.Y.S.2d 131 (1st Dept. 1996), appeal granted, ___

[2]Pearson was the companion case to People v. Martinez in the Court of Appeals, and the court decided the cases in a consolidated opinion.

N.Y.2d ___, ___ N.Y.S.2d ___ (Jan. 9, 1997), to revisit the Court of Appeals' decision in Pearson. See R.A. 22-23, 24 (Statement Pursuant to NYCA Rule 500.2 submitted by appellant in People v. Robert Ayala; Order Granting Leave to Appeal).[3] Additionally, the state cites People v. Nieves, ___ A.D.2d ___, 648 N.Y.S.2d 583 (1st Dept. 1996), as an example of a case in which an intermediate New York appellate court elected to follow the New York Court of Appeals' Pearson decision rather than the Second Circuit's decisions in this case. See P. 17. But the state fails to say that on February 4, 1997 -- one month prior to the state's filing its petition for certiorari -- Judge Joseph W. Bellacosa granted leave to appeal in that case to re-evaluate Pearson and to review the correctness of the intermediate appellate court's Nieves decision. See R.A. 25-26, 27 (Statement Pursuant to NYCA Rule 500.2 submitted by appellant in People v. Nieves; Order Granting Leave to Appeal).

Because the New York Court of Appeals has acted to address any differences it may have with the Second Circuit's decision in this case, the apparent conflict between the New York Court of Appeals and the Second Circuit may dissipate. If the conflict between the courts is soon resolved -- as it appears it will be -- there is no need for this Court to exercise its discretionary authority to resolve the conflict. Thus, this Court's certiorari

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[3]On information and belief the respondent in this action, Steven Ayala, is unrelated to Robert Ayala.

review, based on a putative state-federal conflict, is unnecessary or, at the very least, premature.[4]

Citing a decade-old Third Circuit case, the state inaccurately contends that there is also a conflict between the Second and Third Circuits on this issue. See P. 17-18. In United States v. Raffoul, 826 F.2d 218, 225 (3d Cir. 1987), the Third Circuit held that a newspaper seeking access to the defendant's trial testimony, over the state's and the defendant's objections, must suggest reasonable alternatives to closure of the courtroom. In so holding, the court relied exclusively upon Justice Powell's concurring opinion in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), which suggested that once the defendant seeking closure showed that fundamental fairness would likely be prejudiced by his testifying in open court, the defendant's right to a fair trial required the press to propose alternatives if it objected to closure. Id. at 401.

Nothing in Justice Powell's concurrence intimates that the defendant must make a showing of alternatives to protect his presumptive right to an open courtroom. Indeed, Justice Powell's subsequent opinion for the unanimous Court in Waller put to rest

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[4]Nor is there any merit to the state's suggestion that apparent disagreement among judges of the Second Circuit Court of Appeals warrants certiorari in this case. See P. 14-15, 18. Intra-circuit conflicts are an insufficient basis for granting a writ of certiorari because such differences can be settled through en banc proceedings or later panels' deference to the prior decision. E.g., Stern, Gressman, et al., Supreme Court Practice § 4.6, 177 (7th ed. 1993). Those are precisely the circumstances here. The Second Circuit declined the state's suggestion for rehearing en banc in this case and has subsequently followed Ayala.

the state's misimpression here that, in the face of the defendant's objection to secrecy, the court may disregard reasonable alternatives to complete closure. In Waller, the Court made clear that because courtrooms are presumptively open, the state carries the burden to justify closing the courtroom over the defendant's objection. 467 U.S. at 45-48. To enforce the accused's fundamental right to a free and public trial, Waller requires that the closure be no broader than necessary, and, consequently, that the court always consider reasonable alternatives to complete closure. Id. See Press-Enterprise II, 478 U.S. at 14 (trial court improperly failed to consider alternatives short of complete closure); Press-Enterprise I, 464 U.S. at 510 (proponent must show that closure is "narrowly tailored" to serve compelling interest likely to be prejudiced). Hence, the purported conflict with Raffoul is illusory, and the Second Circuit held, appropriately, that the state trial court denied Mr. Ayala's right to a public trial when it failed to consider whether there were any reasonable alternatives to complete closure.

Similarly, to justify closing a criminal proceeding to the public, the state was required to advance an overriding interest that was likely to be prejudiced. Waller, 467 U.S. at 48. To satisfy this standard, the state bore the burden of demonstrating not only an "overriding" or "compelling" interest that justified the exclusion of the public, but also a "substantial probability" that the asserted interest would have been prejudiced if the

proceeding were to remain open. Press-Enterprise II, 478 U.S. at 14.

As an afterthought to its contention that conflicting authority warrants review, the state criticizes the Second Circuit's conclusion that the prosecution failed to make out a substantial probability that Dotson's safety or cover would be at risk if he testified in open court. See P. 18-19. As a preliminary matter, the state's argument that certiorari is necessary on the ground that the court "improperly" applied First Amendment standards in a Sixth Amendment case ignores Waller's clear mandate that the same legal standards apply to Sixth Amendment cases as to First Amendment cases. 467 U.S. at 46.

Moreover, as noted above, the state's backup argument is equally flawed on the merits. The circumstances of this particular case presented no justification for closing the courtroom to the general public. As the Second Circuit carefully explained:

> Although Dotson testified that he was fearful for his safety should he be required to testify in open court, he did not state any particularized fear resulting from testifying at Ayala's trial. In fact, Dotson explicitly stated that there was nothing special about the trial that made him fearful. Nor did he suggest that anyone in a position to blow his cover was likely to be in the courtroom when he testified. Rather, Dotson expressly stated that he sought courtroom closure as a matter of course whenever he testified.

Ayala v. Speckard, 89 F.3d 91, 95 (2d Cir. 1996); see Ayala v. Speckard, 102 F.3d 649, 652 (2d Cir. 1996) (court "continue[s] to

disagree with" state's argument that Dotson's safety would have been exposed to substantial probability of prejudice).[5]

In short, the Second Circuit's conclusion that the prosecution failed to establish any probability -- let alone a "substantial one" -- that anyone observing Dotson's testimony in open court would threaten his safety or cover should he return to where Mr. Ayala was arrested, and that the trial court improperly failed to consider reasonable alternatives, was a straightforward, and correct, application of this Court's decisions in Waller, Press-Enterprise I, and Press-Enterprise II. Because the court's ruling was an unremarkable application of well established Supreme Court precedent, and because the New York Court of Appeals has recently taken steps to resolve its apparent conflict with the Second Circuit, this Court therefore should deny the state's petition for a writ of certiorari.

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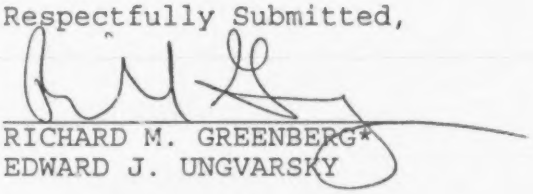
[5]The state argues that "[g]iven the many drug cases depending on the work of undercover officers," the Second Circuit's decision places future convictions "in grave peril" and "will be catastrophic to the administration of justice in New York." P. 17. The state's alarmist contention in this case -- resting on the hypothesis voiced by Dotson that the courtroom should always be closed in undercover drug cases -- is disingenuous. New York City stands alone as the only jurisdiction in the nation to reflexively close the courtroom in unexceptional street-level drug cases such as this one. All other jurisdictions, federal or state, large cities or tiny hamlets, follow the constitutional command, without any noticeable "catastrophic" effects, that closure is the exception and not the rule.

CONCLUSION

For these reasons, the state's petition for a writ of certiorari should be denied.

Respectfully Submitted,



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April 8, 1997

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: CRIMINAL TERM: PART 48

---------- INDICTMENT NO.

THE PEOPLE OF THE STATE OF NEW YORK 7667/90

-against-

STEVEN AYALA,

Defendant,

---------- VOLUME I.

851 Grand Concourse
Bronx, New York
July 15, 1991

B E F O R E: HONORABLE MARTIN MARCUS,

Justice and a jury.

A P P E A R A N C E S:

ROBERT T. JOHNSON, ESQ.,
District Attorney, Bronx County
BY: LISA DREZNICK, ESQ.,
Assistant District Attorney

MICHAEL BERARDINO, ESQ.,
Attorney for the Defendant.

FILED
JUN 19 1992
SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

Michele Henley
Senior Court Reporter

I try to blend in with the way that they dress.

Q Thank you, Detective.

And are you familiar with the term buy operation?

A Yes, I am.

Q How many types of buy operations are there?

A Two.

Q Okay. And what types are there, please?

A There's short term buy operations and long term buy operations.

Q Now, first let me direct your attention to what is called the long term buy operation.

A Yes, Maam.

Q Can you please describe to the members of the Grand Jury exactly what that is?

A A long term--excuse me.

A long term buy operation is an operation by which it's done over extended periods of time. You make a buy, then you buy another time from this person or person that were involved.

Short--I'm sorry. That's it.

Q Okay. And you said the person involved, are they the same people that are involved with the long term?

A Yes, Ma'am.

Q Okay. Now, directing your attention to a short term

buy operation. Can you please define that for the members of the jury?

A Yes, Ma'am. A short term buy and bust is an operation--basically it's a buy and bust. You go to a vicinity in the--or a certain area and you buy from anyone that's selling there and, then, they are then arrested at the buy.

Q Okay. And these are one time encounters on the street?

A Yes, Ma'am.

Q Okay. Have you had occasion as an undercover police officer to work on buy operations?

Aa Yes.

Q And what type have you worked on?

A Short term.

Q Okay. And in a short term buy operation, can you please specify what your function has been as an undercover police officer?

A My function is to attempt to purchase narcotics from anyone that's selling narcotics.

Q Okay. And how many buys would you say you've made since June of 1989, when you bec[illegible] an undercover police officer?

A Two hundred or so.

Q

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: CRIMINAL TERM: PART 48

THE PEOPLE OF THE STATE OF NEW YORK — INDICTMENT NO.

-against- — 7667/90

STEVEN AYALA,

Defendant,

VOLUME III

851 Grand Concourse
Bronx, New York
July 17, 1991

B E F O R E: HONORABLE MARTIN MARCUS,

J u s t i c e and a jury.

A P P E A R A N C E S:

ROBERT T. JOHNSON, ESQ.,
District Attorney, Bronx County
BY: LISA DREZNICK, ESQ.,
Assistant District Attorney

MICHAEL BERARDINO, ESQ.,
Attorney for the Defendant.

Michele Henley
Senior Court Reporter

FILED
JUN 19 1992
SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

this case which require you to find the defendant not guilty.

Thank you very much.

THE COURT: Miss Dreznick.

MS. DREZNICK: Your Honor, ladies and gentlemen of the jury, Mr. Triplette and Mr. Berardino, I'd like to first begin by thanking you for your attention during this trial and for your listening closely to the evidence and the testimony that's been presented here.

I stand before you once again, no client next to me but as a representative of the citizens of Bronx County, as a representative of Robert T. Johnson, District Attorney of Bronx County.

We are at the point in the trial which is called the summations where I will have an opportunity to talk to you and I am greatful for this opportunity to do so.

During my summation I'm going to try to guide you through the testimony which you've heard and I'm going to be drawing some inferences, I'm going to be asking you to accept them.

Now, after being here the last three days

testimony, that you would look at their demeanor, that you would evaluate who has an interest in this case, who has an interest in the outcome of this case.

Well, I'm asking you to do so now, ladies and gentlemen. There were two witnesses that were called in here, Detective Willie Dotson and Police Officer Freddie Garcia.

I ask you to ask yourselves who has something to lose by a verdict of not guilty. I submit to you that these officers do not. Who has something to lose by the outcome of this case. I submit to you that these police officers do not, and who has an interest in the facts of this case, I submit to you the officers do not. They're not here today to find out what the outcome is, ladies and gentlemen, they're out on the street--

MR. BERARDINO: Objection, Your Honor.

THE COURT: Overruled.

MS. DREZNICK: Now, ladies and gentlemen, the police officers were cross examined and they were scrutinized by the defense but the police officers are not on trial at this time.

APPENDIX B

COURT OF APPEALS
STATE OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondents, :

-against- : STATEMENT PURSUANT TO NYCA Rule 500.2

ROBERT AYALA, :

Defendant-Appellant. :

----------X

1. By permission of the Honorable George Bundy Smith, Associate Justice of the Court of Appeals granted on January 9, 1997, appeal is taken from an order of the Appellate Division, First Department, which affirmed with opinion a judgment entered on June 16, 1994 in Supreme Court, New York County, convicting appellant after trial of the crime of criminal sale of a controlled substance in the third degree, P.L. 220.39(1), and sentencing him to a prison term of 4½ to 9 years.
2. The indictment number in the trial court was 9521/93.
3. The order of the Appellate Division herein appealed was dated October 29, 1996.
4. The order and judgment appealed from were received by appellant on November 6, 1996. Service was by mail.
5. The Respondents on this appeal are represented by Hon. Robert Morgenthau District Attorney, New York County, One Hogan Place, New York, New York 10013.

6. The following issues are likely to be raised on appeal:

1. Whether the People made an insufficient showing, under the guidelines established by this Court in People v. Pearson, 82 N.Y.2d 436 (1993), to justify closure of the courtroom during appellant's trial where the undercover officer testified to no more than a general location of operation and to concerns for his safety that were unconnected in any way to his open court testimony in appellant's case. U.S. Const., Amend. VI; N.Y. Civil Rights Law, §12; N.Y. Judiciary law, §4.

2. Whether the legal standard for courtroom closure articulated by the court in Pearson remains viable in view of the Second Circuit's decision in Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996).

3. Whether where the Supreme Court in Waller v. Georgia, 467 U.S. 39 (1984), has stated that the trial court must consider reasonable alternatives to courtroom closure, defense counsel is not required to suggest alternatives in order to preserve the issue as a matter of law.

7. This Court has jurisdiction to entertain the appeal pursuant to C.P.L. §450.90(1).

APPENDIX C

State of New York
Court of Appeals

BEFORE: HON. GEORGE BUNDY SMITH, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ROBERT AYALA,

Appellant.

ORDER GRANTING LEAVE

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York
January 9, 1997

George Bundy Smith
Associate Judge

*Order of the Appellate Division, First Department, entered October 29, 1996, affirming a judgment of the Supreme Court, New York County, rendered June 16,1994.

*Description of Order:

APPENDIX D

COURT OF APPEALS
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- : STATEMENT PURSUANT TO NYCA RULE 500.2

MILTON NIEVES, :

Defendant-Appellant. :

----------X

1. By permission of the Honorable Joseph W. Bellacosa, Associate Judge of the Court of Appeals, granted on February 4, 1997, appeal is taken from an order of the Appellate Division, First Department, which affirmed a judgment of the Supreme Court, New York County, entered September 22, 1992, convicting appellant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

2. The indictment number in the trial court was 674/92.

3. The order of the Appellate Division herein appealed was dated October 29, 1996.

4. The order appealed from was received by appellant on November 6, 1996. Service was by mail.

5. The Respondent on this appeal is represented by the Honorable Robert M. Morgenthau, District Attorney, New York County, One Hogan Place, New York, New York 10013.

6. The following issues are likely to be raised on appeal:

1. Whether, where defense counsel objected to the exclusion of his wife and

children from the courtroom, and the trial court itself admitted that they posed no danger to the undercover officer, the court violated appellant's right to a public trial when it nonetheless closed the courtroom to defendant's family and all spectators. U.S. Const. Amends. VI, XIV; Civil Rights Law § 12; Judiciary Law §4.

2. Whether appellant's exclusion from side bar colloquies during jury selection, where potential jurors were questioned about their familiarity with the crime scene and with appellant, violated his right to be present. C.P.L. §260.20; People v. Sloan, 79 N.Y.2d 386 (1992); U.S. Const. Amends., VI, XIV.

7. This Court has jurisdiction to review the issues listed above, pursuant to Criminal Procedure Law section 450.90(2)(a), because the Appellate Division's affirmance was on the law and the underlying issues were preserved by defense counsel's objections and the trial court's rulings to the contrary.

APPENDIX E

State of New York
Court of Appeals

BEFORE: HON. JOSEPH W. BELLACOSA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

Milton Nieves,

Appellant.

ORDER GRANTING LEAVE

I, JOSEPH W. BELLACOSA, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York

February 4, 1997

Joseph W. Bellacosa

Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered October 29, 1996, affirming a judgment of the Supreme Court, New York County, rendered September 22, 1992.